# Petition

81-163

No.

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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1980

RAYMOND R. LYON, MARGARET L. LYON, CHARLES F. FOGERTY, STELLA FOGERTY, RUSSELL S. GROVE, NANCY J. GROVE, HAROLD E. EBRIGHT, JR., KATHERINE FAIRLIE EBRIGHT, GEORGE HILTON EDMONDSON, JANET LOUISE EDMONDSON, LAWRENCE L. LINDSEY, JR., ROSEMARY F. LINDSEY, HOMER M. HAYWARD, REID W. DENNIS, and TAHOE MEADOWS (a California corporation),
*Petitioners,*

VS.

STATE OF CALIFORNIA, STATE LANDS COMMISSION OF THE STATE OF CALIFORNIA and DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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## QUESTIONS PRESENTED

1. Whether this Court's decision in *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892), decided as a matter of federal constitutional law that each state's succession to and disposition of lands beneath nontidal navigable waters is subject to the restrictions of the "public trust" doctrine described in that case.

2. If not, whether the decisions of the California Supreme Court which for the first time impose an easement in favor of the public for navigation, environmental and recreational purposes over all lands lying below the high water mark on navigable lakes and rivers have effected a taking of private property without payment of compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.*

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*In addition to Raymond R. Lyon, Margaret L. Lyon, Charles F. Fogerty, Stella Fogerty, Russell S. Grove, Nancy J. Grove, Harold E. Ebright, Jr., Katherine Fairlie Ebright, George Hilton Edmondson, Janet Louise Edmondson, Lawrence L. Lindsey, Jr., Rosemary F. Lindsey, Homer M. Hayward, Reid W. Dennis and Tahoe Meadows (a California corporation), Tahoe Shorezone Representation (a Nevada corporation) and the County of Lake were Real Parties in Interest in the California Supreme Court proceedings. In addition to State of California, State Lands Commission of the State of California, and Department of Fish and Game of the State of California, the respondents include Kenneth Cory, State Controller, Chairman of the State Lands Commission; Mervyn M. Dymally, Lieutenant Governor, Commissioner of the State Lands Commission; Roy M. Bell, Director of Finance, Commissioner of the State Lands Commission; William F. Northrop, Executive Director of the State Lands Commission; Evelle J. Younger, Attorney General of the State of California; and J. F. Trout, Manager, Land Operations of the Division of State Lands.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions presented | i |
| Opinions below | 2 |
| Jurisdiction | 2 |
| Constitutional and statutory provisions involved | 4 |
| Statement | 5 |
| Reasons for granting the writ | 13 |

## TABLE OF AUTHORITIES CITED

### Cases


Page

Anderson v. Trotter, 213 Cal. 414, 2 P.2d 373 (1931) .... 6

Appleby v. City of New York, 271 U.S. 364 (1926) .....13, 24

Barney v. City of Keokuk, 94 U.S. (4 Otto) 324 (1876) .....5, 15, 17, 19

Bohn v. Albertson, 107 Cal.App.2d 738, 238 P.2d 128 (1951) ..... 14

Boone v. Kingsbury, 206 Cal. 148, 273 P. 797 (1928) 21

City of Los Angeles v. Aitken, 10 Cal.App.2d 460, 52 P.2d 585 (1935) ..... 6

Craig v. White, 187 Cal. 489, 202 P. 648 (1921) ..... 6

Crews v. Jonnson, 202 Cal.App.2d 256 (1962) ..... 6

Dawson v. Superior Court, 158 Cal. 73, 110 P. 479 (1910) ..... 3

Field Research Corp. v. Superior Court, 71 Cal.2d 110, 453 P.2d 747 (1969) ..... 2, 3

Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851) ..... 14

Hardin v. Jordan, 140 U.S. 371 (1891) .....15, 17

Hitchings v. Del Rio Woods Recreation and Park District, 55 Cal.App.3d 560 (1976) ..... 14

Hughes v. Washington, 389 U.S. 290 (1967) .....23, 24

Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892)..... .....i, 10, 13, 16, 17, 18, 19

International News Serv. v. Associated Press, 248 U.S. 215 (1918) ..... 23

## Table of Authorities Cited

### Cases

Page

Kaiser Aetna v. United States, 444 U.S. 164 (1979) ....22, 23

Lamprey v. State and Metcalf, 52 Minn. 181, 53 N.W. 1139 (1893) ..... 23

Leo Sheep Co. v. United States, 440 U.S. 668 (1979)....22, 25

Los Angeles Athletic Club v. City of Long Beach, 128 Cal.App. 427, 17 P.2d 1061 (1932) ..... 21

Maginnis v. Hurlbutt, 49 Cal.App. 460, 193 P. 606 (1920) ..... 6

Marks v. Whitney, 6 Cal.3d 251, 491 P.2d 374 (1971)..14, 20

Massachusetts v. State of New York, 271 U.S. 65 (1926) ..... 15

Muhlker v. New York and H. R. Co., 197 U.S. 544 (1905) ..... 24

Newcomb v. City of Newport Beach, 7 Cal.2d 393, 60 P.2d 825 (1936) ..... 21

Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) .....15, 17, 19, 22

Overstreet v. County of Butte, 57 Cal.2d 504, 370 P.2d 335 (1962) ..... 3

Packer v. Bird, 137 U.S. 661 (1891) ..... 15

People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913) ..... 14

People ex rel. Baker v. Mack, 19 Cal.App.3d 1040 (1971) ..... 14

Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845) 5

## Table of Authorities Cited

### Cases

Page

Pumpelly v. G.B. & M. Canal Co., 80 U.S. (13 Wall.) 166 (1872) ..... 24

San Francisco Savings Union v. R. G. R. Petroleum Co., 144 Cal. 134, 77 P. 823 (1904) ..... 23

Tally v. Ganahl, 151 Cal. 418, 90 P. 1049 (1907) ..... 3

United States v. Gossett, 416 F.2d 565 (9th Cir. 1969) 6

United States v. Lutz, 295 F.2d 736 (5th Cir. 1961) .... 23

United States v. Lynah, 188 U.S. 445 (1903) ..... 24

United States v. Pueblo of San Ildefonso, 513 F.2d 1383 (Ct. Cl. 1975) ..... 23

United States v. River Rouge Improv. Co., 269 U.S. 411 (1926) ..... 23

United States v. Title Insurance & Trust Co., 265 U.S. 472 (1924) .....22, 24

Vasquez v. Superior Court, 4 Cal.3d 800, 484 P.2d 964 (1971) ..... 3

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) ....17, 19

Yates v. Milwaukee, 77 U.S. (10 Wall.) 497 (1871) ..... 23

### Statutes

California Civil Code, Section 830 .....4, 5, 6, 12, 17, 19, 22

Nev. A.B. 234, amending Nev.Rev.Stat. § 321.595 (1979) .....18, 19

28 U.S.C. § 1257(3) ..... 3

TABLE OF AUTHORITIES CITED

**Other Authorities**


| | Page |
|---|---|
| 1964 Concurrent Resolutions of the California Assembly and Senate | 6 |
| Ops. Cal. Atty. Gen. 3100 at 5-6 (1916) | 6 |
| 23 Ops. Cal. Atty. Gen. 97 (1954) | 6 |
| 23 Ops. Cal. Attty. Gen. 306 (1954) | 6 |
| 30 Ops. Cal. Atty. Gen. (1957) | 6 |
| 43 Ops. Cal. Atty. Gen. 291 (1964) | 6, 9 |
| Nev. Op. Atty. Gen. No. 204 (1976) | 18 |


**Constitution**


United States Constitution:

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|---|---|
| Fifth Amendment | i, 4, 7, 10, 14 |
| Fourteenth Amendment | i, 4, 7, 10, 14 |

No.

# In the Supreme Court

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STATE OF CALIFORNIA, STATE LANDS COMMISSION OF THE STATE OF CALIFORNIA and DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioners Raymond R. Lyon, Margaret L. Lyon (hereinafter referred to as "Lyon"), Charles F. Fogerty, Stella Fogerty, Russell S. Grove, Nancy J. Grove, Harold E. Ebright, Jr., Katherine Fairlie Ebright, George Hilton Edmondson, Janet Louise Edmondson, Lawrence L. Lind-

*Tahoe Meadows is a non-profit corporation and has no subsidiaries or affiliates.

sey, Jr., Rosemary F. Lindsey, Homer M. Hayward, Reid W. Dennis, and Tahoe Meadows (hereinafter referred to as "Fogerty"), pray that a writ of certiorari issue to review the judgments of the Supreme Court of the State of California entered in these causes on March 20, 1981.

## OPINIONS BELOW

The opinion of the California Supreme Court (with dissenting opinion) entered in *State of California v. Superior Court (Lyon)* is reported at 29 Cal.3d 210, 625 P.2d 239 (1981), hereinafter cited as "App. A-1." The opinion of the California Supreme Court (with dissenting opinion) entered in *State of California v. Superior Court (Fogerty)* is reported at 29 Cal.3d 240, 625 P.2d 256 (1981), hereinafter cited as "App. A-2." Copies of the opinions and orders issuing peremptory writs of mandate of the California Supreme Court and that court's denial of Lyon's and Fogerty's petitions for rehearing and the decisions of the trial courts are included in Appendix A.

## JURISDICTION

The opinions and orders[1] issuing peremptory writs of mandate by the California Supreme Court were both entered on March 20, 1981. Timely petitions for rehearing

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[1]As more fully detailed in the Statement of the Case, *infra*, the judgments below both arose from respondents' filing of petitions for writs of mandate seeking reversal of the trial court's orders granting partial summary judgment in Lyon's and Fogerty's favor. Under California law, the granting of a partial summary judgment is a nonappealable interlocutory order. However, in recent years, the California courts have expressly condoned the practice of utilizing an extraordinary writ procedure to seek immediate appellate review of such orders. *Field Research Corp. v. Superior Court*, 71

were denied and judgment was entered on April 29, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). The federal questions presented for review by this Court, *viz.*, whether a public trust easement impresses the beds of all inland waters below high water mark as a matter of federal constitutional law and, if not, whether

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Cal.2d 110, 453 P.2d 747 (1969); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 484 P.2d 964 (1971).

In providing for this expedited appellate review, the California courts have equated the use of the petition for writ of mandate in this context with the traditional proceeding by way of extraordinary writ. Accordingly, the issuance of a writ of mandamus, along with a written opinion affirming or overruling a trial court's interlocutory order, is *res judicata* as to any further proceedings in which the issues decided thereby are raised. *Dawson v. Superior Court*, 158 Cal. 73, 110 P. 479 (1910); *Overstreet v. County of Butte*, 57 Cal.2d 504, 370 P.2d 335 (1962). Further, the appellate court's decision will be deemed the "law of the case" and must be adhered to throughout the subsequent progress of the litigation at trial as well as the appellate level. *Tally v. Ganahl*, 151 Cal. 418, 90 P. 1049 (1907).

Consequently, the judgments below by California's highest court issuing peremptory writs of mandate directing the trial courts to vacate their orders granting partial summary judgment and to enter judgment in respondents' favor finally resolve the issue of the boundaries of, and public rights in, the beds of California's non-tidal navigable waters. Moreover, even characterizing the writ proceedings below as in the nature of an interlocutory appeal, the decisions of the California Supreme Court have in fact disposed of all of the issues raised by the underlying litigation. The only issue which was not raised by petitioners' and respondents' cross-motions for partial summary judgment was that of estoppel. However, as more fully set forth in the Statement of the Case, *infra*, the California Supreme Court concluded, as a matter of law, that petitioners could not pursue relief by way of estoppel. App. A-2, A-42. Accordingly, the decisions below represent a final resolution of the *Lyon* and *Fogerty* actions.

the California Supreme Court's action below in imposing such an easement for the first time constitutes an unconstitutional taking, were first raised in the *Lyon* and *Fogerty* complaints and have been repeated at virtually every stage of the litigation below.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 830 of the California Civil Code provides as follows:

> Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark; *when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark*; when it borders upon any other water, the owner takes to the middle of the lake or stream. (Emphasis added.)

The Fifth Amendment to the United States Constitution provides in relevant part as follows:

> . . . ; nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the United States Constitution provides:

> . . . ; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT

With this Court's decision in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), it became settled that each newly admitted state to the Union was entitled to the beds of its tidal waterbodies by reason of its sovereignty under the Equal Footing Doctrine. By its decision in *Barney v. City of Keokuk*, 94 U.S. (4 Otto) 324 (1876), this Court extended state sovereign claims to the beds of navigable nontidal waters. However, *Barney v. City of Keokuk* recognized the right of each state to develop its own rules governing ownership of inland waters, including the right of the states to claim to ordinary high water mark, low water mark or to relinquish all interests to the upland owners. *Id.* at 338. Although tidal and nontidal navigable waters were thereby accorded similar treatment with respect to claims of sovereign ownership, the distinction that existed at common law between tidelands,[2] which were subject to the public trust for commerce, navigation and fishery, and inland waters, which were not, remained.

It is in this setting that California adopted Civil Code Section 830 in 1872. In relevant part, that section provides as follows:

> Except where the grant under which the land is held indicates a different intent, the owner of the upland, . . . when it borders upon a navigable lake or stream, where there is no tide, . . . takes to the edge of the lake or stream, at low water mark. . . .

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[2]Tidelands are those lands underlying tidal waters which are subject to the daily ebb and flow of the tides below the mean high water mark.

Ever since the adoption of Civil Code Section 830, the California courts,[3] the Ninth Circuit Court of Appeals,[4] the administrative agencies of the State charged with managing state sovereign lands,[5] as well as the Attorney General of the State of California,[6] have consistently recognized that by virtue of that section, California disclaimed any interest in the beds of its nontidal navigable waterbodies landward of the ordinary low water mark. The disclaimer evidenced by Civil Code Section 830 encompassed *all* sovereign claims as to the area between high and low water marks including the right to impress those lands with the public trust easement for commerce, navigation and fishery.

Lyon owns 800 acres of property bordering Clear Lake—a navigable nontidal waterbody located in Lake County,

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[3] *Maginnis v. Hurlbutt*, 49 Cal.App. 460, 193 P. 606 (1920); *Craig v. White*, 187 Cal. 489, 202 P. 648 (1921); *Anderson v. Trotter*, 213 Cal. 414, 2 P.2d 373 (1931); *City of Los Angeles v. Aitken*, 10 Cal. App.2d 460, 52 P.2d 585 (1935); *Crews v. Johnson*, 202 Cal.App.2d 256 (1962).

[4] *United States v. Gossett*, 416 F.2d 565 (9th Cir. 1969).

[5] In 1964, for example, the California Legislature determined that it was "necessary to establish the boundary of the bed [of Clear Lake] by surveying the low water mark of the lake." (1964 Concurrent Resolutions of the California Assembly and Senate.) Pursuant to that legislative authority, the State Lands Commission of the State of California conducted a survey of the low water mark of Clear Lake over a period of eight years at a cost to the taxpayers in excess of $400,000. A similar survey of the natural low water mark at Lake Tahoe was conducted in 1950 and the results of that survey were expressly adopted by the State Lands Commission in 1953.

[6] 43 Ops. Cal. Atty. Gen. 291 (1964), a copy of which is included as Appendix C; 30 Ops. Cal. Atty. Gen. 262 (1957); 23 Ops. Cal. Atty. Gen. 306 (1954); 23 Ops. Cal. Atty. Gen. 97 (1954); Ops. Cal. Atty. Gen. 3100 at 5-6 (1916).

California. That portion of his property here at issue encompasses approximately 500 acres lying between the ordinary high and low water marks of Clear Lake. Lyon, seeking to return that area to its previously reclaimed status, applied to the State of California in 1974 for a permit to repair a levee. The State notified Lyon that it would not process his application because it now claimed ownership of the beds of all nontidal waterbodies to the ordinary high water mark in its sovereign capacity.

Lyon thereupon filed an action in Lake County on June 29, 1976, against the State and various of its agencies seeking to quiet title to the entire extent of his property and for declaratory relief.[7] The State of California cross-claimed against Lyon to quiet title to those portions of the property lying between the natural high and low water marks and seeking a declaratory judgment that such property was subject to a public trust easement for com-

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[7]By the Third Cause of Action of Lyon's Complaint to Quiet Title, violation of Amendments V and XIV to the United States Constitution was explicitly alleged:

> l. ... Such claim by defendants State of California and County of Lake deprives the plaintiffs of their property without due process of law and denies plaintiffs the equal protection of the law and is in violation of Amendments V and XIV of the United States Constitution and Sections 1, 11, 13 and 14 of Article I of the California Constitution.
>
> . . . .
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> n. Plaintiffs allege that defendants State of California, State Lands, Fish and Game, and County of Lake are seeking to take plaintiffs' property without just compensation having first been paid in violation of Article I, Section 14 of the California Constitution and Amendment V of the United States Constitution.

*Lyon* Complaint to Quiet Title, p. 12, lines 7-12; 18-23.

merce, navigation and fishery comparable to that which, under California law, existed only over tidelands.

Lyon, the State and the County of Lake as intervenor,[8] all filed motions for partial summary judgment in support of their respective claims. Petitioner Lyon's Motion for Partial Summary Judgment urged, *inter alia*, that California law had never recognized a public trust easement in the beds of its inland waters. Lyon Memorandum of Points and authorities in Support of Motion for Partial Summary Judgment, pp. 32-34. Conversely, by their Motion for Partial Summary Adjudication, respondents argued that "federal common law" governs ownership of, and public interests in, lands underlying nontidal navigable waters:

> It is only reasonable for California to look to the United States Supreme Court for its interpretation of the law as it should be applied to the navigable waters of this country. Not only has that court enunciated a consistent rule on the subject, but the United States Government is California's antecedent American Government.

Respondents' Memorandum of Points and Authorities in Support of Motion for Partial Summary Adjudication and Injunction, pp. 40-41.

The trial court resolved all questions of law in Lyon's favor, concluding that no portion of Lyon's property lying landward of the last natural ordinary low water mark at Clear Lake is, or ever was, sovereign property of the State

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[8]The County of Lake's complaint in intervention supported Lyon's claim of ownership to low water mark.

of California. Although recognizing a public right of navigation over the waters of Clear Lake, the trial court further concluded that no portion of the property at issue is, or ever was, impressed with a public trust easement.[9]

On January 19, 1979, the State filed a Petition for Writ of Mandate with the California Supreme Court seeking to vacate the trial court's order and to have judgment entered in its favor. Following transfer of the petition (on the Supreme Court's own motion) to the California Court of Appeal, the First Appellate District issued its order denying the requested relief. The State thereupon petitioned the California Supreme Court for a hearing which was granted on April 26, 1979.

During the progress of petitioner Lyon's litigation, the Attorney General of the State of California issued a letter opinion in March, 1977, in which he purported to "clarify" that office's position with respect to litigation pending between the state and private owners (including the *Lyon* action) regarding sovereign claims to the beds of navigable nontidal waters.[10] While expressly acknowledging that his office had taken a contrary position in the past,[11]

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[9]For a discussion of the distinction between the right of navigation and the public trust easement, see note 19, *infra*. A copy of the trial court's order in *Lyon* is included as Appendix A-3.

[10]A copy of the March 8, 1977, letter opinion is included as Appendix D.

[11]Prior to Attorney General Younger's 1977 letter opinion (which was specifically withheld from publication in light of pending litigation), the agencies of the State of California responsible for administering state lands had relied on Attorney General Stanley J. Mosk's 1964 opinion (43 Ops. Cal. Atty. Gen. 291) which concluded that Civil Code § 830 represented the State of California's election to

Attorney General Evelle J. Younger concluded that the State's current claims regarding ownership of, and public trust interests in, the beds of navigable lakes and rivers up to high water mark was supported by a "reanalysis" of relevant authority. Almost immediately thereafter, the State Lands Commission—the agency of the State responsible for administering state sovereign land—adopted a resolution requesting the staff to record "notices" proclaiming that the State claimed title to all property extending between high and low water on all navigable lakes and rivers and that such area was subject to a highly restrictive public trust easement.

Petitioners Fogerty, et al., all of whom own property bordering Lake Tahoe, thereupon filed an action on March 30, 1977, in Placer County, to quiet title and for declaratory relief and further seeking to enjoin the State of California from recording notices, other than a notice of lis pendens, claiming any ownership or public trust interest in the property lying between high and low water mark on Lake Tahoe.[12] The trial court's October 17, 1977, order granting petitioners' request for the issuance of a pre-

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relinquish any claim of sovereign ownership of the beds of inland waters landward of low water mark. A copy of the 1964 Attorney General's Opinion is included as Appendix C.

[12]The allegations set forth in Lyon's Complaint as to the State's violation of Amendments V and XIV to the United States Constitution (see note 7, *supra*) were repeated in substantially identical form in Fogerty's Complaint for Declaratory Relief (Complaint, p. 12, lines 20-26; p. 13, lines 1-7). In its First Amended Answer to First Amended Complaint, respondents incorporated as Exhibit A Attorney General Younger's March 8, 1977, letter opinion (App. D) which in pertinent part relies on *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892), as the sole authority for the State's assertion that the lands in question are subject to a public trust easement.

liminary injunction was appealed by the State of California on December 2, 1977. On March 28, 1978, the Court of Appeal for the Third District issued its opinion upholding the trial court's issuance of the preliminary injunction order.[13]

Shortly thereafter, Fogerty and the State filed cross-motions for partial summary judgment raising substantially the same issues urged in *Lyon*.[14] In addition, the State in *Fogerty* contended that its sovereign interest in the bed of Lake Tahoe was expanded by the artificial raising of the lake level despite the fact that the affected landowners would not be compensated for the property inundated by the increased water level. The trial court denied the State's motion in its entirety and concluded as a matter of law that no portion of Lake Tahoe landward of the last natural ordinary low water mark is or ever was sovereign property of the State of California and that no portion of such property is or ever was subject to the tidelands public trust easement.[15]

The State of California petitioned the California Supreme Court for a writ of mandate in *Fogerty* on

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[13]A copy of the Court of Appeal's opinion is included as Appendix B.

[14]Fogerty's Motion for Partial Summary Judgment reiterated the views expressed in Lyon's motion, *viz.*, that California had never elected to impress the beds of its inland waters with a public trust easement, and further argued that the State's ownership and public trust claims to high water mark, if successful, would constitute a taking without just compensation. Fogerty Memorandum of Points and Authorities in Support of Motion for Partial Summary Judgment, pp. 32-47.

[15]A copy of the trial court's order granting Fogerty's Motion for Partial Summary Judgment is included as Appendix A-4.

July 2, 1979, seeking to have the judgment of the trial court set aside and judgment entered in its favor. The California Supreme Court issued alternative writs of mandate in both *Lyon* and *Fogerty* on May 22, 1980, and both cases were consolidated for hearing.[16] By its decision below, entered on March 20, 1981, the California Supreme Court directed the issuance of peremptory writs of mandate directing the trial courts in *Lyon* and *Fogerty* to vacate their respective orders granting petitioners' motions for partial summary judgment and to enter judgment in favor of respondents.

In *Lyon*, the California Supreme Court concluded that, although petitioners' title extended to the low water mark on Clear Lake by virtue of consistent administrative construction of Civil Code Section 830 to that effect, the area below high water mark was retroactively impressed with the tidelands public trust easement.[17]

In *Fogerty*, the California Supreme Court adopted its decision in *Lyon*, and further held the boundary between

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[16]Over twenty briefs were filed in the California Supreme Court consolidated proceedings by petitioners, respondents and numerous amici curiae. At each stage of those proceedings, petitioners repeated the positions first articulated in their respective complaints and subsequently urged as the basis for their Motions for Partial Summary Judgment.

[17]By its opinion in *Lyon*, the California Supreme Court expressly passed on the taking question:

> Lyon's final argument is that his ownership of the Anderson Marsh to low water free of the public trust is a "rule of property" and that a determination applying a trust to such property would accomplish a taking of private property in violation of federal and state constitutional provisions. He relies upon cases which recognize the protection of property rights afforded

sovereign and private interests at Lake Tahoe to be the artificially raised low water mark. Finally, the court held that the State could not, *as a matter of law,* be estopped to assert the existence of the public trust easement as to lands lying between high and low water mark, despite its acknowledgment that the issue of estoppel was not properly before it. App. A-2, A-42.

Petitions for rehearing were filed by petitioners in both *Lyon* and *Fogerty* on April 3, 1981, and were denied by the California Supreme Court on April 29, 1981.

## REASONS FOR GRANTING THE WRIT

The California Supreme Court, by its decisions below, has construed this Court's ruling in *Illinois Central R.R. v. Illinois,* 146 U.S. 387 (1892), as imposing a restraint on the ability of each state to develop its own rules of property governing the beds of its inland waters as a matter of federal constitutional law. In petitioners' view, *Illinois Central* is simply a construction of Illinois law.[18] Accordingly, the California Supreme Court's reliance on *Illinois Central* as the sole authority for impressing, for the first time, all riparian lands below present high water mark with a highly restrictive public trust easement is an erroneous reading of that case. Further, the action of the

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> by the federal and state Constitutions. [Citations.] We doubt whether any failure of the state to previously assert its trust rights in the lands below high water [citations] constitutes a "rule of property."

App. A-1, A-27.

[18] This Court has, in fact, characterized its decision in *Illinois Central* as "necessarily a statement of Illinois law." *Appleby v. City of New York,* 271 U.S. 364, 395, n. 13 (1926).

court below in thus subjecting these lands to an easement in favor of the public has effected a taking of petitioners' property without payment of compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

1. At the time of California's admission to the Union in 1850, the English common law concept that only tidal waters could be navigable at law prevailed in this country. Likewise, the incidents of the common law public trust for commerce, navigation and fishery were confined to tidal waterbodies. The only public interest recognized in nontidal waters at that time was the right of navigation which allowed members of the public to pass over navigable waters as and when they were capable of sustaining navigation.[19] In 1851, however, this Court expanded the concept of navigability from its common law roots and held that nontidal waters which were navigable in fact would be considered navigable in law for purposes of admiralty jurisdiction. *Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851).

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[19]For a comparison between this public right of navigation which exists over nontidal *waters* when and if they are capable of sustaining navigation and the public trust easement which encumbers *lands* which at any time since 1850 were, or are, covered by tidal waters are impressed, *see Bohn v. Albertson*, 107 Cal.App.2d 738, 238 P.2d 128 (1951) (*right of navigation*); *Hitchings v. Del Rio Woods Recreation and Park District*, 55 Cal.App.3d 560 (1976) (*right of navigation*); *People ex rel. Baker v. Mack*, 19 Cal.App.3d 1040 (1971) (*right of navigation*) and *Marks v. Whitney*, 6 Cal.3d 251, 491 P.2d 374 (1971) (*tidelands public trust*) and *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913) (*tidelands public trust*).

It was not until 1876 that this Court ruled on the validity of a state's sovereign *title* claims to the beds of inland waters. In *Barney v. City of Keokuk*, 94 U.S. (4 Otto) 324 (1876), this Court upheld the right of Iowa to claim the beds of its inland waters to high water mark. In recognition, however, of the disparate rules which the respective states had already adopted at the time of its decision, this Court explicitly refrained from imposing a doctrine which might unconstitutionally interfere with established property rights:

> Whether, as rules of property, it would now be safe to change these doctrines where they have been applied . . . is for the several states themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections.

*Id.* at 328.

In short, *Barney v. City of Keokuk* judicially sanctioned established patterns of ownership to lands underlying nontidal navigable waters including the right of the states to claim the full incidents of sovereign ownership to ordinary high water mark, low water mark or not at all. Although the opinion is silent on the issue, it is to be presumed that the states were similarly free to impress those lands as to which they asserted sovereign title claims with an easement in favor of the public if they so chose. That it was within the exclusive province of each state to fashion its own rules governing inland waters has been repeatedly and consistently confirmed by this Court,[20] and is vividly

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[20] *See, e.g., Packer v. Bird*, 137 U.S. 661, 663 (1891); *Hardin v. Jordan*, 140 U.S. 371, 382 (1891); *Massachusetts v. State of New York*, 271 U.S. 65, 93 (1926); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

illustrated by the widely disparate complex of rules which have evolved in the respective states concerning ownership of, and public rights in, the underlying lands.[21]

In its decision below, the California Supreme Court held that this Court's ruling in *Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892), established, as a matter of federal constitutional law, a uniform rule of property imposing a highly restrictive public trust easement in favor of the State over all lands lying below the high water mark whether held in private or federal ownership. California had not previously sought to apply the public trust principles described in *Illinois Central* to inland waters, and the decisions of the court below were plainly predicated upon the mistaken belief that *Illinois Central*

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[21]At the present time, only nine states claim title to the beds of navigable lakes and rivers up to the high water mark; four states claim to high water on lakes and recognize private ownership of rivers; twenty-two states claim only to low water; nine make no claim at all; and two claim to low water on lakes and permit private ownership of rivers. Those states which have adopted rules of property which impress nontidal water with an interest comparable to the public trust (Alabama, Arkansas, Florida, Kansas, Nevada and, possibly, Idaho, Michigan and Ohio) have all limited the extent of their trust claims to the same boundary as their sovereign title claims. Of those jurisdictions, only Arkansas, Florida and Kansas impress lands up to the high water mark with the public trust. All other "public trust jurisdictions" only claim sovereign ownership to low water and limit the incidents of the trust to low water. The vast majority of jurisdictions, however, make no pretension of possessing public trust interests in the beds of inland waters whatsoever but rather limit such interests to tidelands. For a discussion of the law of each state, see App. B, A-77 to A-82.

represents a rule of federal constitutional law which applies to *all* navigable waters throughout the country:

> In our view, *Illinois Central Railroad Company v. Illinois* . . . settled the issue. It held very clearly that the applicability of the public trust doctrine does not turn upon whether a body of water is subject to the ebb and flow of the tide, but upon whether it is navigable in fact.

App. A-1, A-21.

In the view of the California Supreme Court, then, *Illinois Central* absolutely restricts each state's ability to develop rules of property governing lands underlying the nontidal navigable waters within its borders. Petitioners submit that the decision of the court below and its construction of *Illinois Central* is in direct conflict with this Court's repeated adherence to the rule first announced in *Barney v. City of Keokuk*, 94 U.S. (4 Otto) 324 (1876), that each state was free to determine what sovereign interests, if any, it chose to assert in the beds of its navigable lakes and streams. The rule of *Barney v. City of Keokuk* was reaffirmed by this Court in *Hardin v. Jordan*, 140 U.S. 371 (1891); *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); and, most recently, in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979). Petitioners willingly acknowledge that it was properly within the State of California's prerogative to have exercised the full potential of its sovereign interests in its inland waters at the time of its admission to the Union. However, as evidenced by its adoption of Civil Code Section 830 in 1872, California explicitly chose not to do so.

If the California Supreme Court's interpretation of *Illinois Central* is correct, the vast majority of states in this country have adopted rules of property governing their inland navigable waters in direct contravention of this federal constitutional mandate. As a result, over forty states will be constrained to retroactively impose a restrictive public trust easement over all lands underlying their nontidal waters waterward of high water mark where no sovereign interest had theretofore existed or been claimed. Although a handful of states have imposed an interest comparable to the public trust in the beds of its inland waters, no state has attempted to impose such an easement landward of its sovereign title claims.[22] Thus, hundreds of thousands of riparian and littoral property owners' good faith reliance on the fact that their title is held free of a public trust easement equivalent in force and scope to that which impresses tidelands, will be irrevocably and unconstitutionally impeached. If this Court were to decline to review the decision of the California Supreme Court, it is to be expected that the success of the State of California's claims will encourage other jurisdictions to initiate similar litigation throughout the country.[23]

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[22]See note 21, *supra*.

[23]By way of example, the State of Nevada had previously attempted to assert sovereign claims in the bed of Lake Tahoe landward of low water mark (which had theretofore been accepted as the boundary between state and private interests) in much the same way California initiated its recently asserted claims as to ownership of, and public trust interests in, the shoreline of inland waters. Nev. Op. Att'y Gen., No. 204 (1976). Nevada's rush to appropriate private lands was abruptly halted by legislation which statutorily confirmed a low water boundary at Lake Tahoe. Nev.

With the limited exceptions set forth in *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), and *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), this Court has always adhered to the principle that matters of property law, particularly as they apply to the beds of navigable waters, are within the exclusive purview of the respective states. *Corvallis* makes clear that this right of the states is a constitutional guarantee protected by the Equal Footing Doctrine. The decision of the California Supreme Court below in construing *Illinois Central*, 146 U.S. 387 (1892), as imposing a federal constitutional restriction on the alienability of lands underlying nontidal waters, places this fundamental right of the states in jeopardy.

In order to avert the confusion, expense and drastic interference with the stability of land titles which the decisions below will engender, this Court should review the reach of its decision in *Illinois Central*, 146 U.S. 387 (1892), in light of the actions taken by the State of California, among others, in formulating rules of property governing land below high water mark on navigable lakes and streams in reliance on the principles set forth in *Barney v. City of Keokuk*, 94 U.S. (4 Otto) 324 (1876).

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A.B. 234, amending Nev.Rev.Stat. § 321.595 (1979). Following the California Supreme Court's decisions below, however, the Attorney General's Office of the State of Nevada has indicated that it will pursue litigation challenging the constitutionality of A.B. 234. Similarly, petitioners have been informed that the State of North Dakota, which has a statute substantially identical to California Civil Code § 830, is in the process of initiating litigation asserting public trust and sovereign ownership interests up to the ordinary high water mark in the beds of its inland waters.

2. The effect of impressing the lands in question—which are dry virtually all of the year—with a public trust easement below high water mark is to convert such lands to public property. The California Supreme Court concluded its opinion in *Lyon* with the remark, "[w]e emphasize that Lyon is not deprived of the use of the lands between low and high water, *and that he may utilize them in any manner not incompatible with the public's interest in the property.*" (Emphasis added.) App. A-2, A-29. To be charitable, this statement is a less-than-adequate characterization of the impact of the court's decisions. Indeed, a review of the California cases interpreting the tidelands trust doctrine, which has now been held to attach to lands fronting on nontidal lakes and streams, reveals that the State possesses virtually unfettered discretion in dictating the uses to which Lyon's property may be put. The State's options range from prohibiting any use by Lyon to actually occupying the property to promote any of a vast array of public purposes.

Under the tidelands trust doctrine, the State could designate Lyon's property as open space so as to preserve the land in its current condition. *Marks v. Whitney*, 6 Cal.3d 251, 259-260, 491 P.2d 374 (1971), one of the more recent California decisions discussing the nature of the public's rights in tidelands, emphasizes the propriety of this course of action:

> There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is a preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as

> open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands.

Similarly, the State could appropriate Lyon's property for a wide variety of public uses. These uses have been held to include the right to excavate or make harbor improvements, without the payment of compensation, *Newcomb v. City of Newport Beach*, 7 Cal.2d 393, 60 P.2d 825 (1936), and the right to explore for and produce oil, gas and other minerals. *Boone v. Kingsbury*, 206 Cal. 148, 273 P. 797 (1928). Under the tidelands doctrine, the state could improve Mr. Lyon's backyard for public playgrounds and parks. *Los Angeles Athletic Club v. City of Long Beach*, 128 Cal.App. 427, 17 P.2d 1061 (1932).

The decision below affects not only petitioners' property, but also that of all owners of land bordering the more than 4,000 miles of shoreline on California's navigable lakes and rivers. Approximately one-half of these lands are owned by the federal government. To detail the variety of uses to which these lands are put is to capsulize the development of the interior of the State. Settlement and development of California's noncoastal areas has been, almost without exception, along the shores of its many navigable lakes and rivers. The area between high and low water along the rivers of the San Joaquin and Sacramento Valleys, for example, which historically have flooded annually, have been reclaimed and now constitute some of the most productive agricultural land in the world.

Particularly in light of the uses to which these lands have been put in reliance on Section 830, the decisions below go well beyond the recognized power of a state court to reverse or modify prior decisions. They represent an abrupt change in the real property law of California impressing a highly restrictive easement over the property of shoreline owners. No California decision had heretofore even intimated that the public trust easement might some day be applied to the area between high and low water marks on lakes and rivers, and indeed the court concedes that even the State had never before asserted that these lands were anything but private property. App. A-1, A-27. The California Supreme Court has ignored that caution often repeated by this Court that "[s]ubstantive rules governing the law of real property are peculiarly subject to the principle of stare decisis." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977); *Leo Sheep Co. v. United States*, 440 U.S. 668, 687-88 (1979); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486-87 (1924).

The action of the California Supreme Court below has effected a taking, with neither due process nor the tender of just compensation, of two of the most essential and valuable elements of the shore front property affected by its decision—the right to the exclusive use of the property and the quality of being riparian.

Last term in *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), Justice Rehnquist wrote for the Court:

> In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the

property right, falls within this category of interests that the government cannot take without compensation.

*See also United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1394 (Ct. Cl. 1975); *United States v. Lutz*, 295 F.2d 736, 740 (5th Cir. 1961); *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). By holding that members of the public have the right to use the dry land area between high and low water marks for a wide variety of purposes, the California Supreme Court has in the same manner as the Government in *Kaiser Aetna* confiscated the right of exclusive use.

Also taken from petitioners is an equally important and valuable property right—the quality of being riparian. Since the lands in question are dry the majority of the year, the plain effect of the California Supreme Court's decision is to sever riparian lands from the water by creating a strip of public land between high and low water. This riparian character of the land has been said to be the ". . . most valuable feature of [the] property . . . ." *Hughes v. Washington*, 389 U.S. 290, 293 (1967). *See also Lamprey v. State and Metcalf*, 52 Minn. 181, 53 N.W. 1139 (1893); *United States v. River Rouge Improv. Co.*, 269 U.S. 411, 419 (1926); *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497 (1871); *San Francisco Savings Union v. R. G. R. Petroleum Co.*, 144 Cal. 134, 77 P. 823 (1904).

The extent to which the California Supreme Court has sanctioned the State's interference with private and federal riparian property rights is magnified by its holding that the State's sovereign interests may be increased by an artificial raising of the water level at Lake Tahoe

thereby converting formerly private property into sovereign lands. The taking of property in this fashion has been consistently prohibited by this Court where it is not accompanied by payment of just compensation. *Pumpelly v. G.B. & M. Canal Co.*, 80 U.S. (13 Wall.) 166 (1872); *United States v. Lynah*, 188 U.S. 445 (1903).

It is axiomatic that a state may not acquire private property for public use by the expedient of declaring a change in the law, either by legislative action or by judicial decision. Justice Stewart in his concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967), expressed the principle as follows:

> To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. [Citations.] The Washington court insisted that its decision was "not startling". [Citation.] What is at issue here is the accuracy of that characterization.

*See also Muhlker v. New York and H. R. Co.*, 197 U.S. 544 (1905); *United States v. Title Insurance and Trust Co.*, 265 U.S. 472, 486-87 (1924); *Appleby v. City of New York*,

271 U.S. 364 (1926); *Leo Sheep Co. v. United States*, 440 U.S. 668, 682-83 (1979).

The issues raised by the California Supreme Court's decisions in these cases can be ultimately resolved only by this Court. A review of the decisions at this time would go far toward restoring stability to land titles in California and, indeed, throughout the country.

Respectfully submitted,

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# Appendix

81-163

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No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1980

RAYMOND R. LYON, MARGARET L. LYON, CHARLES F. FOGERTY, STELLA FOGERTY, RUSSELL S. GROVE, NANCY J. GROVE, HAROLD E. EBRIGHT, JR., KATHERINE FAIRLIE EBRIGHT, GEORGE HILTON EDMONDSON, JANET LOUISE EDMONDSON, LAWRENCE L. LINDSEY, JR., ROSEMARY F. LINDSEY, HOMER M. HAYWARD, REID W. DENNIS, and TAHOE MEADOWS (a California corporation)
*Petitioners,*

VS.

STATE OF CALIFORNIA, STATE LANDS COMMISSION OF THE STATE OF CALIFORNIA and DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA,
*Respondents.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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## TABLE OF CONTENTS


Page

Appendix A-1: *Lyon* opinion ..... A- 1

Appendix A-2: *Fogerty* opinion ..... A-40

Appendix A-3: Trial court's order in *Lyon* ..... A-54

Appendix A-4: Trial court's order in *Fogerty* ..... A-57

Appendix B: Opinion of the California Court of Appeal, Third Appellate District in *Fogerty* ..... A-60

Appendix C: Opinion of Attorney General Stanley J. Mosk (1964) ..... A-83

Appendix D: Letter opinion of Attorney General Evelle J. Younger ..... A-99

## APPENDIX A-1

In The Supreme Court of the State of California

[S.F. No. 23981, Mar. 20, 1981.]

THE STATE OF CALIFORNIA et al., Petitioners, v. THE SUPERIOR COURT OF LAKE COUNTY, Respondent; RAYMOND R. LYON et al., Real Parties in Interest.

### OPINION

**MOSK**, J.—In *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515 [162 Cal.Rptr. 327, 606 P.2d 362], we reaffirmed the ancient doctrine that tidelands—lands between the lines of mean high tide and mean low tide—are owned by the public, that the state holds these lands in trust for the people for their use for commerce, navigation, fishing and other purposes, and that this trust interest is retained even if the title to tidelands has been conveyed to private persons, unless the conveyance has been made to promote the purposes of the trust.

The present case also concerns lands along the shoreline, but the issue here is the boundary between state and private ownership in non-tidal, navigable lakes and streams between high and low water, i.e., lands alternately covered and uncovered by water as the level of the lake rises and falls with the seasons. The Attorney General, representing the People, claims that these lands are owned by the state, which acquired title thereto by virtue of its sovereignty upon admission to the Union, that they have not been conveyed to the owners of the lands along the shoreline, and that even if such conveyances have been made, the

lands in dispute are subject to the trust described in *City of Berkeley.*

Raymond R. Lyon and Margaret L. Lyon, real parties in interest (hereafter called Lyon) own 800 acres along the shore of Clear Lake in Lake County, a navigable body of water with an area of about 64 square miles. The portion of the property involved in the present dispute consists of more than 500 acres of marshland at the southern end of the lake, known as the Anderson Marsh, most of which is covered by water at certain times of the year. Lyon's predecessors in interest purchased the property from the state under patents issued between 1850 and 1906. These grants did not specify the waterward boundary of the land conveyed. Lyon sought to develop the property and applied for a permit to repair a levee for the purpose of reclaiming a portion of the marsh. The Fish and Game Commission notified him that it could not process his application for a permit because the State of California claimed ownership of the portion of the marsh which extends below the high water mark.

Lyon filed an action against the state and various of its agencies,[1] seeking to quiet title to the marsh, and for declaratory relief. He relied, inter alia, upon section 830 of the Civil Code.[2] The section, which was adopted in 1872, provides "Except where the grant under which the land is held indicates a different intent, the owner of the

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[1]Lyon joined the Department of Fish and Game and the State Lands Commission in the action. The commission has jurisdiction over the beds of navigable waters owned by the state or in which the state has an interest. (Pub. Resources Code, § 6301.)

[2]All references are to the Civil Code unless otherwise noted.

upland, when it borders on tide-water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

The People filed a cross-complaint to quiet title in the state to the portion of the Anderson Marsh between high and low water and for declaratory relief. The County of Lake intervened in the action in its capacity as grantee in trust of the state's interest in the lands underlying the lake. (Stats. 1973, ch. 639, § 1, p. 1165.) The county supported Lyon's claim that he owns the property to the line of low water.

Lyon, the county, and the People, all moved for partial summary judgment based on their respective claims. The trial court ruled in favor of Lyon and the county (hereafter sometimes collectively referred to as Lyon); it determined that no portion of the Anderson Marsh lying landward of the ordinary low water mark of Clear Lake is sovereign property of the state or subject to a common law public trust, but that the waters of the lake are impressed with a public servitude so that when the water rises above the low water mark, the public has the right to navigate between that line and the ordinary high water mark. The People seek a writ of mandate to compel the trial court to vacate its order, and to grant the People's motion for partial summary judgment.

The case involves issues which are of vast importance to the general public as well as to the owners of land bordering

upon navigable lakes and streams. The significance of these issues has generated extensive briefs by amici curiae,[3] and their analyses and arguments have been of considerable assistance to the court. No less than 4,000 miles of shoreline along 34 navigable lakes and 31 navigable rivers in the state are involved. Substantial areas of land will be affected by our decision; at Clear Lake alone, there is a difference of 5,000 acres in the surface area of the lake between high and low water, and the Anderson Marsh constitutes one-half of the remaining fresh water marsh at Clear Lake. Lands of the type involved in this proceeding constitute a resource which is fast disappearing in California; they are of great importance for the ecology, and for the recreational needs of the residents of the state.

Lyon's claim to the fee ownership of Anderson Marsh to the low water line is based on the following reasoning: California never acquired title to the beds underlying navigable nontidal waters above low tide. The United States Supreme Court has made it plain that the ownership of such lands is a matter of state rather than federal law. (*Hardin v. Jordan* (1891) 140 U.S. 371, 382 [35 L.Ed. 428, 433, 11 S.Ct. 808]; *Barney v. Keokuk* (1876) 94 U.S. 324, 338 [24 L.Ed. 224, 228].) The states exercised their options with regard to ownership of such land by adopting

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[3]The Department of Water Resources has filed an amicus brief in support of the People, as have the Sierra Club and the Natural Resources Defense Council (joint brief) and the Audubon Society and Friends of the Earth (joint brief). The California Land Title Association and the California Association of Realtors (hereafter referred to as California Land Title Association) have filed a joint brief on behalf of Lyon, and the Upper San Joaquin River Association also supports Lyon's position.

different rules; some states claim only to low water, some to high water, and others make no sovereign claim to the beds of nontidal bodies. Indeed, only a minority of states claim sovereign ownership to high water.[4] When California entered the Union, it determined to exercise no sovereign claim to the beds of nontidal navigable waters. This choice was made when, upon admission to statehood, the Legislature adopted a statute which provided that unless inconsistent with applicable federal or state law, the "Common Law of England shall be the rule of decision in all Courts of this State." (Stats. 1850, ch. 95, p. 219.) Under English common law, the sovereign made no claim to ownership of lands underlying nontidal waters. Therefore, by the adoption of the English common law, California made no claim to ownership of the beds of such waters. Subsequently, by the enactment of section 830 in 1872, the state determined to claim title only to low water.

The People contend, on the other hand, that California acquired title to the lands in question to the high water mark in its sovereign capacity upon statehood, citing, inter alia, *State Land Board v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 370-371 [50 L.Ed.2d 550, 558-559, 97 S.Ct. 582]; *Barney v. Keokuk, supra,* 94 U.S. 324, 338. Moreover, argue the People, section 830 did not grant such lands to private persons because that provision only sets forth a rule for the construction of deeds and does not constitute a grant of sovereign land.

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[4]Approximately 20 states adopt a low water line for navigable lakes and rivers, a few allow private ownership to the middle of the water, and other jurisdictions have adopted different rules for lakes and rivers. Ten jurisdictions have adopted the high water rule. (See fn. 9 at p. . . ., *post.*)

We consider, first, whether California acquired sovereign ownership in the lands between low and high water in nontidal, navigable lakes and rivers upon admission to the Union. If this question is answered in the negative, the People's claim to fee ownership of these lands cannot prevail. If, on the other hand, the state owned the property in question at the time of admission to the Union, it will be necessary to decide whether, by the enactment of section 830 in 1872, it granted an interest therein to riparian landowners and, if so, the extent of the interest conveyed.

We begin with the proposition that, even accepting Lyon's assertion that the state did not automatically succeed to title to the beds of navigable nontidal lakes and streams to high water upon statehood but only had the option to make such a claim, absent an indication that the new state declined to exercise sovereign ownership of such lands, we would be compelled to decide the issue in favor of the state's title. The only basis for a claim that California abdicated its rights to claim to high water in 1850 was the adoption of the common law of England as the rule of decision in this state.[5]

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[5]The disagreement between the parties in this regard appears to focus not upon the question whether the state had the power to grant these lands to private persons, but upon when such power was exercised, i.e., when California entered the Union or thereafter. The People urge that the state succeeded to the ownership of the lands in question to high water as an inherent aspect of sovereignty, although sovereignty implies that after admission to the Union the state had the power to grant them to private persons. Lyon argues, on the other hand, that California never owned these lands but only had the option to claim ownership, and when it was admitted to the Union, by the adoption of the common law in 1850 and section 830 in 1872, the state elected not to exercise its right to claim ownership of the land between low and high water.

In England, there were different rules concerning the ownership by private persons of the beds of tidal waters and nontidal waters. Nontidal rivers and lakes were privately owned; a riparian holder took to the middle of the lake or the thread of the stream, much like the landowner along a public street. At the same time, the beds of all navigable waters were said to belong to the crown, and the King held such property in trust for the public and could not dispose of it free of that trust. Only waters where the tide ebbed and flowed were considered to be navigable in England. The reason for the difference in these rules is readily explainable: in England there were no navigable streams of any importance beyond the ebb and flow of the tide. Therefore, the terms "navigable" and "tidal" became synonymous; tidal (navigable) waters came to mean public waters, while nontidal (and in England nonnavigable) waters came to mean private waters. (*The Propeller Genesee Chief et al. v. Fitzhugh et al.* (1851) 53 U.S. (12 How.) 443, 454-458 [13 L.Ed. 1058, 1063-1065]; *Barney v. Keokuk, supra,* 94 U.S. 324, 338.)[6]

Some of the original 13 states adopted the common law rule early in their history, for the same reason that the rule was appropriate in England, i.e., most of their waters were tidewaters, and until the use of steamboats "there could be nothing like foreign commerce upon waters with

[6]The People contend that although the common law rule has generally been assumed to be as described above, there is some authority for the proposition that the tidal character of a body of water was not a critical factor in England in the determination of navigability. Numerous cases in addition to those referred to above support our characterization of the English rule. We need not discuss the authorities upon which the People rely, since we shall conclude that the common law test was not adopted in California.

an unchanging current resisting the upward passage." (*The Propeller Genesee Chief*, 53 U.S. at p. 455 [13 L.Ed. at p. 1063].) However, the English rule was obviously inappropriate as the nation expanded westward, where there were great rivers and lakes which were navigable in fact, even though they were not subject to the ebb and flow of the tide. These distinctions, and the inapplicability of the common law rules to conditions in much of the United States were recognized as early as 1851 by the United States Supreme Court. In *The Propeller Genesee Chief* it was held that the federal government had admiralty jurisdiction in rivers and lakes which were navigable in fact, whether or not the tide ebbed and flowed therein. In 1856, the courts of this state recognized that the tidal character of a body of water was not a proper test of navigability. (*American Water Co. v. Amsden* (1856) 6 Cal. 443, 446.)

The question of public ownership of navigable rivers and lakes was discussed in *McManus v. Carmichael* (1856) 3 Iowa 1. That case, which involved the boundary of public ownership along the Mississippi River, contains an exhaustive analysis of the common law rule of England and its application by early American courts. The court held that only those parts of the common law which were suitable to the conditions in Iowa were adopted by the new state. The opinion asks, rhetorically and somewhat floridly, "whether the rules and tests which are applicable enough to the rivulets of England, shall be taken to measure those waters whose flow is through the climates and zones of the earth?" (*Id.* at p. 31.) Needless to say, it held that the state owned the beds of navigable, nontidal bodies to

high water, and that the common law rule was inappropriate to the United States because the great nontidal rivers and lakes in this country are navigable in fact. Other states recognized the inapplicability of the English rule to conditions in this country prior to 1850. (E.g., *Carson v. Blazer* (Pa. 1810) 2 Binn. 475, 484-486; *Cates v. Wadlington* (S.C. 1822) 1 McCord 580, 582.)

In *Barney v. Keokuk, supra,* 94 U.S. 324, the high court considered the rule declared in *McManus,* and left no doubt the correct doctrine was laid down by that case, i.e., that the states own the beds of navigable, nontidal bodies to high water, and that the common law is inapplicable to conditions in the United States. Nevertheless, it held that states which had adopted the common law rule had the power to determine whether "as rules of property" it would be safe to change their adherence to the common law. After reaching these conclusions, the court made a statement upon which Lyon places great reliance: "If they [the states] choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." (*Id.* at p. 338 [24 L.Ed. at p. 228].) Later cases repeated the proposition that the states are free to determine the ownership of lands below high water mark in navigable, nontidal lakes and streams. (*Hardin v. Jordan, supra,* 140 U.S. 371, 382 [35 L.Ed. 428, 433]; *Shively v. Bowlby* (1894) 152 U.S. 1, 40 [38 L.Ed. 331, 346, 14 S.Ct. 548].)

With this background, we consider whether we are compelled to conclude, as Lyon asserts, that by the adoption of the English common law in 1850, California accepted

the rule of private ownership of nontidal navigable waters so that title to their beds was never in the state but was granted directly to private riparian owners. We do not so conclude.

First, our courts have never adhered slavishly to common law doctrines if they were unsuitable to the circumstances of our people or if the conditions were those never contemplated by the common law. (*Van Ness v. Pacard* (1829) 27 U.S. (2 Pet.) 137, 143-144 [7 L.Ed. 374, 376-377]; *Jones v. California Development* (1916) 173 Cal. 565, 573-574 [160 P. 823].) *Crandall v. Woods* (1857) 8 Cal. 136, 142-143, referred to the English test of navigability as a rule "framed with special reference to the physical condition of a country differing widely from our own." The law is replete with situations in which this and other jurisdictions which adopted the common law have refused to follow those aspects which were unsuitable to local conditions. (See Traynor, *Statutes Revolving in Common-Law Orbits* (1968) 43 State Bar J. 509, 518 et seq.; Hall, *The Common Law* (1951) 4 Vand.L.Rev. 791, 805 et seq.) If we were to hold, as Lyon urges, that the adoption of the common law in 1850 signified the acceptance in this state of the English rule regarding the ownership of the lands in question, we would "apply a rule founded on a particular reason, to a case where that reason utterly fails." (*Crandall* at p. 143.)[7]

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[7]Lyon appears to argue that because *The Propeller Genesee Chief* was not decided until 1851, the year after California entered the Union, and *Barney* was not decided until four years after section 830 was enacted into law, the holdings of these cases may not be considered in deciding whether California, by adopting com-

Rejection of the common law rule is also supported by the enactment of section 830 in 1872. As we have seen, under English common law, a riparian landholder owned land beneath nontidal waters to the middle of the lake or the thread of the stream; the King had no ownership interest in such lands. Under the terms of section 830, according to Lyon, the boundary between public and private ownership was set at the low water line. If we were to accept Lyon's assertion, we would be led to the entirely irrational conclusion that, although California, by the adoption of the common law in 1850, granted fee title to lands beneath navigable nontidal waters to the center line, 22 years later it deprived riparian owners of their property to the center by the enactment of section 830, and decreed that henceforth they owned only to the low water mark.[8]

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mon law rules, intended to relinquish the state's right to claim ownership of the beds of navigable, nontidal waters. We cannot agree. These cases and many others (including some cases cited above decided before 1850) demonstrate that the common law rule regarding nontidal waters is inappropriate to conditions in this state. The concept that only common law doctrine applicable to local conditions has been incorporated into our law is as old as the state itself.

[8]*Wright v. Seymour* (1886) 69 Cal. 122, 127 [10 P. 323], is relied upon by Lyon for the proposition that section 830 merely codified the common law. It is true that the decision states the section is a "declaration of the law . . . as it has existed since the formation of our state government." However, this statement was made with reference to the portion of section 830 relating to tidal waters.

Lyon does not directly discuss the inconsistency between his assertions regarding the common law and the effect of section 830. He claims that the state "may have followed the English common law prior to 1872, and made no claims to the beds of non-tidal navigable waters," and that section 830 "finally resolved any uncertainty about prior common law rules in California." The problem with this approach is that it skirts the critical issue whether the state or

Finally, we observe that the jurisdictions which hold the high water line to be the boundary between private and public ownership have also adopted the common law as the rule of decision.[9] These cases demonstrate that there is an inconsistency between not accepting the English rule regarding the ownership of the beds of nontidal, navigable lakes and rivers and the adoption of the common law as the rule of decision.

The conclusion follows that California succeeded to the ownership of the beds of such waters upon its admission to the Union, to the high water mark.

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private persons owned the beds of navigable, nontidal bodies to high water between 1850 and 1872. If California followed the English common law, then private persons owned these lands to the center line and were deprived of their property between that line and low water by the enactment of section 830. If, as we conclude above, the common law rule was not adopted in this respect, then the lands were owned by the state to high water, at least until 1872. Amicus curiae California Land Title Association, recognizing this anomaly, asserts that enactment of section 830 amounted to an unconstitutional taking of lands of riparian owners between the center line and low water mark.

[9]Alaska (*State, Dept. of Natural Resources v. Pankratz* (1975) 538 P.2d 984, 988); Arizona (*State v. Bonelli Cattle Company* (1971) 107 Ariz. 465 [489 P.2d 699, 701-702], revd. on other grounds (1973) 414 U.S. 313 [38 L.Ed.2d 526, 94 S.Ct. 517], overruled in *Corvallis Sand & Gravel Co., supra*, 429 U.S. 363, 382 [50 L.Ed.2d 550, 565]); Arkansas (*Anderson v. Reames* (1942) 204 Ark. 216 [161 S.W.2d 957, 959]); Florida (*Martin v. Busch* (1927) 93 Fla. 535 [112 So. 274-283]); Idaho (*Gasman v. Wilcox* (1934) 54 Idaho 700 [35 P.2d 265, 266]); Kansas (*Siler v. Dreyer* (1958) 183 Kan. 419 [327 P.2d 1031, 1033]); Oklahoma (*State v. Nolegs* (1 4) 40 Okla. 479 [139 P. 943, 946]); Oregon (*Brusco Towboat Co. v. State, By and Through Straub* (1977) 30 Ore.App. 509 [567 P.2d 1037, 1040, 1042]); Utah (*Provo City v. Jacobson* (1947) 111 Utah 68 [181 P.2d 213, 214]; Washington (*State v. Superior Court* (1912) 70 Wash. 442 [126 P. 945, 947]).

We next consider whether the Legislature granted the lands in question to private persons by the enactment of section 830 in 1872. We do not doubt that the state had the power to make such grants. (See, e.g., *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363, 375 [50 L.Ed.2d 550, 561]; *Barney v. Keokuk, supra,* 94 U.S. 324, 338; *Hardin v. Jordan, supra,* 140 U.S. 371, 382 [35 L.Ed. 428, 433].) The question is whether section 830 was intended to accomplish this result.

As we have seen, the section provides that "[e]xcept where the grant under which the land is held indicates a different intent, the owner of the upland, . . . when it borders upon a navigable lake or stream, where there is no tide, . . . takes to the edge of the lake or stream, at low water mark. . . ."[10] Section 830 was a part of the Field Code, and when it was enacted in 1872, the Legislature added section 670 as well as section 2077 of the Code of Civil Procedure. Section 670 provides that the state is the owner of "all land below the water of a navigable lake or stream. . . ." Section 2077 sets forth rules for construing conveyances in situations where the construction is doubt-

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[10]As originally enacted, the section did not contain the introductory clause. It read, "When land borders upon tide water, or upon water which constitutes an exterior boundary of the State, the owner of the upland takes to high water mark; when it borders upon a navigable lake where there is no tide, the owner takes to the edge of the lake at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream." The statute was amended in 1874 to its present form. (Stats. 1873-1874, Amend. to the Codes, ch. 612, p. 220.) The People rely upon this change as indicating that the section was intended to set forth only a rule of construction.

ful. It provides that a deed to land bordering a navigable nontidal lake is to be construed as conveying the right of the grantor to low water mark.

The People urge that section 670 is a rule of property, and sections 830 and 2077 are rules of construction. They point out that section 830 contains no words of conveyance, such as "grant" or "quitclaim," and argue that to construe the section as a grant of thousands of linear miles of lands owned by the public would violate the rule that grants by the public to a private party are to be construed in favor of the public. (§ 1069; *People v. Centr-O-Mart* (1950) 34 Cal.2d 702, 703 [214 P.2d 378]; *Oakland v. Oakland Water Front Co.* (1897) 118 Cal. 160, 174-175 [50 P. 277].) Lyon claims, on the other hand, that section 830 constitutes a rule of property, and that by enactment of the section, the state granted to riparian owners the lands to low water.

The parties cite numerous cases in support of their respective positions as to the interpretation of the section. We have examined these cases, and we find that while they contain dicta, suggestions, and implications from which one side or the other may take comfort, none contains a direct holding on the question whether section 830 was intended to constitute a grant of property between high and low water in navigable lakes and rivers.

Lyon relies upon *Packer v. Bird* (1886) 71 Cal. 134 [11 P. 873]. In that case, the plaintiff claimed ownership of an island in a navigable portion of the Sacramento River, asserting that his patent extended to the thread of the stream, which included the island. The court held that his

title went only to the "edge of the stream" and did not include the island. The quoted words are obviously ambiguous, but Lyon, in support of the argument that the "edge of the stream" means low water, relies upon the briefs of the parties in the case, which discussed the import of sections 830 and 670. Reference in a brief to these statutes is insufficient to clarify the ambiguous language employed by the court.[11]

The case most favorable to the position of Lyon is the *City of Los Angeles v. Aitken* (1935) 10 Cal.App.2d 460 [52 P.2d 585]. There the court declared that the title of private landholders in a navigable nontidal lake extended to low water mark, citing section 830, and that the state was the owner below low water, citing section 670. However, the statement was dictum, since the only issue in the case was whether Los Angeles, which sought to condemn fee simple title to the littoral rights of landowners to maintain the natural level of the lake, could avoid payment of substantial damages because of the poor quality of the water for domestic use.[12]

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[11]*Packer* was affirmed by the United States Supreme Court, which also employed ambiguous language in its decision. (*Packer v. Bird* (1891) 137 U.S. 661, 672 [34 L.Ed. 819, 822, 11 S.Ct. 210].) Later decisions of the high court cited *Packer* for the proposition that the jurisdiction of California in nontidal navigable waters extends to high water. (*Hardin v. Jordan, supra,* 140 U.S. 371, 382-383 [35 L.Ed. 428, 433-434]; *Shively v. Bowlby, supra,* 152 U.S. 1, 44-45 [38 L.Ed. 331, 347-348].)

[12]Other cases relied upon by Lyon either make no reference to section 830 (*Maginnis v. Hurlbutt* (1920) 49 Cal.App. 460 [193 P. 606]; *Crews v. Johnson* (1962) 202 Cal.App.2d 256, 258 [21 Cal. Rptr. 37] [in a dispute between adjoining littoral owners at Clear Lake, the court stated that the parties conceded that private owner-

The People rely primarily on *Churchill Company v. Kingsbury* (1918) 178 Cal. 554 [174 P. 329]. In that case, the petitioner sought to compel the surveyor-general to perform acts preliminary to issuance of a patent for the lands between high and low water in Little Klamath Lake, which the court found to be navigable. The petitioner relied upon the terms of an 1893 statute in support of his claim. It was held that the statute did not authorize the issuance of the patent. In the course of its opinion, the court noted that the petitioner took the position that "the land is, in fact sovereign land of the state, and in this, we think it is clearly right." (178 Cal. at p. 558.) The statement was dictum, the court did not cite section 830, and Lyon points out that the briefs of the parties in the case did not bring the section to the attention of the court. (See also *People v. Morrill* (1864) 26 Cal. 336, 356.)

If the decisional law is ambiguous regarding whether section 830 constitutes a grant or a rule for the construction of deeds, the same cannot be said of the administrative interpretation of the provision. Lyon has produced a voluminous body of evidence demonstrating that, with few

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ship of the submerged lands extended to low water]) or refer to the section but do not discuss its meaning (*Craig v. White* (1921) 187 Cal. 489, 492 [202 P. 648] [the court cited § 830 for the proposition that patents issued by the federal government conveyed title to the patentees to "the actual margin of the lake"]; *Foss v. Johnstone* (1910) 158 Cal. 119, 130 [110 P. 294] [citing § 830 as setting forth "certain incidents attaching to lands bordering upon waters" in a case involving a nonnavigable pond].) In *United States v. Gossett* (9th Cir. 1969) 416 F.2d 565, 568-569, the court classified California as a low water jurisdiction, apparently based largely upon the disclaimer by California's Attorney General to ownership of the state above that line.

exceptions, state authorities, including the Attorney General, took the position until at least 1970 that by virtue of the provisions of section 830 the state claimed ownership only to the low water mark. (See 43 Ops.Cal.Atty.Gen. 291, 295 (1964); 30 Ops.Cal.Atty.Gen. 262, 269 (1957); 23 Ops. Cal.Atty.Gen. 305, 307 (1954); 23 Ops.Cal.Atty.Gen. 97, 98 (1954).) In 1970, the Attorney General reexamined this position, and reversed his opinion, and in the trial of a condemnation action involving the Feather River (People v. Shasta Pipe and Supply Co. (Sup. Ct. Butte Co., No. 37390), and in other actions thereafter, asserted that the state owned the land under navigable lakes and streams to high water. In 1977, the Attorney General advised the State Lands Commission of this position.

According to affidavits, the files of the State Lands Commission contain hundreds of letters stating or implying that the state's ownership extends waterward of the ordinary low water mark.

Finally, the Legislature has impliedly accepted the low water mark of Clear Lake as the boundary of the state's ownership. The state has conveyed to Lake County its title to Clear Lake, in trust. The language of the grant assumes that the state's interest is to low water mark. (Stats. 1973, ch. 639, § 1, p. 1165.)[13]

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[13]Section 1 of the statute, after granting to the county, in trust, the state's interest in Clear Lake, provides, "The low water mark for Clear Lake has not been determined, and such determination may have to be made by judicial adjudication. Subject to such later determination and for the purpose of the administration of this grant only, the low water mark shall be considered by the parties to this grant as being zero on the Rumsey Gauge." The Rumsey

We are aware of the rule that the administrative construction of a statute is not necessarily determinative (*Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 756-757 [151 P.2d 233, 155 A.L.R. 405]), but we cannot ignore these long-continued and frequently expressed views to the effect that section 830 constitutes a grant to private persons of title to the beds of navigable, nontidal bodies to low water mark. It cannot be said that the statute is so clear and unambiguous that these expressions may be disregarded. In this connection, we note that two states which adopted a statute similar to section 830 as part of the Field Code, interpret their enactments as conveying title to riparian owners to the low water mark in navigable, nontidal waters. (Mont. Rev. Codes 1947, § 67-712; *Herrin v. Sutherland* (1925) 74 Mont. 587 [241 P. 328, 331, 42 A.L.R. 937]; N.D. Cent. Code, § 47-01-15; *Hoque v. Bourgois* (N.D. 1955) 71 N.W.2d 47, 52 [54 A.L.R.2d 633].)[14]

We conclude, therefore, that Lyon has title to the low water mark of Clear Lake.

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Gauge refers to a method by which Captain George Rumsey established the level of Clear Lake. The intersection of zero on that gauge with an elevation of 1,318.65 feet may represent the low water mark of the lake.

[14]There is no merit in the argument of the People that because section 830 has been employed to construe deeds in disputes involving nonnavigable waters (*Hess v. Merrell* (1947) 78 Cal.App. 2d 896, 899-900 [178 P.2d 467]) and tide waters (*Lynch v. Kupfer* (1933) 134 Cal.App. 652, 656 [26 P.2d 33]), the provision cannot be viewed as a rule of property in nontidal cases. We find nothing inconsistent in the notion that the provision may state a rule of property and may also constitute a rule for the construction of deeds.

We come, then, to the question whether the grant of lands between high and low water made by section 830 to riparian landholders is free of the trust described in *City of Berkeley*. It is well settled that if the state holds these lands in trust for the benefit of the public, its conveyance of title to private persons does not necessarily free the property from the burden of the public trust. Instead, unless the conveyance is made for the purpose of promoting trust goals, the grantee takes title subject to the rights of the public. This was the holding in *City of Berkeley* and in *People v. California Fish Co.* (1913) 166 Cal. 576, 596 [138 P. 79].

In *City of Berkeley*, we were concerned with whether 22,299 acres of tidelands in San Francisco Bay, granted to private persons by deeds purportedly in fee, between 1868 and 1870, were subject to the tidelands trust. We answered this question in the affirmative. We observed that under the venerable doctrine of the tidelands trust, which had its origin in Roman law, tidelands are owned by the state in trust for the public, for their use for commerce, navigation, fishing, recreation, or for the purpose of preserving the property in its natural state. Grants of such lands to private persons are subject to the trust unless the conveyances are made to enhance trust purposes. We determined that the grants in question were not made for such purposes, and that in any event, the state was not empowered to make such vast grants to private parties in its role as trustee.

The holding of *California Fish* is similar. There it was decided that, although various statutes authorizing the alienation of tidelands into private ownership effectively

passed title, the grantees took subject to the rights of the public because the grants in question were not made for the purpose of promoting the aims of the trust.

Lyon and amicus California Land Title Association urge that there is not and never has been a doctrine that nontidal, navigable waters are subject to a public trust. Rather, they claim, such waters are impressed only with a "recreational or navigational easement" which allows the public to use only the waters, so that when they rise above low water mark, the public may use them for navigation or fishing, but the bed between low and high water belongs to the riparian owner and when the water recedes the public has no right to use of the land above the low water mark.

The People and supporting amici curiae rely upon article X, section 4 of the Constitution,[15] which provides for freedom of access to and the right of navigation upon waters that are navigable. They rely also upon numerous cases which declare that California owns the lands under navigable waters in trust, without distinguishing between tidal and nontidal bodies in this regard. (See, e.g., *Colberg, Inc. v. State of California* (1967) 67 Cal.2d 408, 416 [62 Cal.Rptr. 401, 432 P.2d 3]; *Boone v. Kingsbury* (1928) 206

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[15]This provision was adopted in 1879 as article XV, section 2. It states: "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

Cal. 148, 189 [273 P. 797]; *People v. Gold Run D. & M. Co.* (1884) 66 Cal. 138, 151 [4 P. 1152].)

In our view, *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018, 13 S.Ct. 110], which we described in *City of Berkeley* as the "seminal case on the scope of the public trust doctrine" (26 Cal.3d at p. 521), settled the issue. It held very clearly that the applicability of the public trust doctrine does not turn upon whether a body of water is subject to the ebb and flow of the tide, but upon whether it is navigable in fact.

*Illinois Central* involved a grant by the State of Illinois of 1,000 acres of the bed of Lake Michigan constituting the entire harbor of the City of Chicago, to the Illinois Central Railroad. The high court held that the grant was revocable, that the state held these lands in trust for the public, and that it was powerless to relinquish its rights as trustee. The opinion addressed itself specifically to whether the trust doctrine was inapplicable because there was no appreciable tide in Lake Michigan. It rejected this premise in the following unmistakable language: ". . . by the common law, the doctrine of the dominion over and ownership by the crown of lands . . . under tidewaters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters . . . being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over

the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations." (146 U.S. at pp. 436-437 [36 L.Ed. at pp. 1036-1037].)

Lyon and amicus California Land Title Association insist that the holding of *Illinois Central* is confined to the Great Lakes, which are "special because of their size and importance in interstate commerce." While it is true that the opinion emphasizes the importance of the Great Lakes for commerce, the portion of the opinion quoted above makes it clear that it is navigability which is the touchstone in determining whether or not the public trust applies. The application of the trust doctrine to tidal waters is not confined to those bodies which are huge in size and important for purposes of commerce; we can see no reason why such a test should not be applied to nontidal waters. Nor does *Illinois Central* set forth a special rule relating to Lake Michigan. Other jurisdictions have recognized that the doctrine enunciated in that case applies to nontidal bodies which cannot be characterized as "inland

seas." (E.g., *State v. Southern Sand & Material Co.* (1914) 113 Ark. 149 [167 S.W. 854, 856]; *State v. Korrer* (1914) 127 Minn. 60 [148 N.W. 617, 623]; *Flisrand v. Madson* (1915) 35 S.D. 457 [152 N.W. 796, 801]; *Hazen v. Perkins* (1918) 92 Vt. 414 [105 A. 249, 251 23 A.L.R. 748]; *State v. Public Service Commission* (1957) 275 Wis. 112 [81 N.W.2d 71, 73-74.)[16] It is noteworthy that South Dakota, like California, has adopted a provision similar to section 830 but, as *Flisrand* makes clear, the state has impressed a trust for public uses on the riparian owner's property between high and low water.

Another matter of interest in this connection is that an opinion of the California Attorney General relied upon by Lyon for the proposition that section 830 has been interpreted by state officials as setting a low water boundary for public ownership explicitly qualified this opinion by the statement that the riparian owner's title between low and high water is held in trust to preserve the rights of commerce and navigation for the public. (43 Ops.Cal. Atty.Gen., *supra*, 291, 294.)[17]

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[16]In support of this assertion, Lyon states that other navigable waters in Illinois, such as the Mississippi River, are owned by private parties. (Citing *City of St. Louis v. Rutz* (1891) 138 U.S. 226, 242 [34 L.Ed. 941, 947-948, 11 S.Ct. 337]; *Peoria v. Central Nat. Bank* (1906) 224 Ill. 43 [79 N.E. 296, 299].) In *Appleby v. City of New York* (1926) 271 U.S. 364, 395 [70 L.Ed. 992, 1004, 46 S.Ct. 569], it was said that although *Illinois Central* was "necessarily a statement of Illinois law," the general principle declared therein has been recognized throughout the country.

[17]The opinion states, "[U]pon its admission to the Union, California acquired title to all land below the high water mark of all navigable water within its territory, whether or not such water was tidal. This title is held in trust for the people of the State, in order

Our conclusion that the public trust is applicable to nontidal waters is also pertinent to the consideration of Lyon's argument, apparently accepted by the trial court, that as to the area between high and low water the public has an interest only in the water itself, so that it may use the water for boating and fishing, but when a lake or stream is at low water, the public has no right to use the bed to the high water mark. In *Marks v. Whitney* (1971) 6 Cal.3d 251, 259 [98 Cal.Rptr. 790, 491 P.2d 374], we held that, although early cases had expressed the scope of the public's right in tidelands as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the tidelands in their natural state.

We see no justification in reason or authority for the proposition advanced by Lyon. In *People* ex rel. *Baker v. Mack* (1971) 19 Cal.App.3d 1040 [97 Cal.Rptr. 448], relied upon by Lyon as holding that the public interest in nontidal waters is confined to the waters themselves, the primary issue was the navigability of a section of the Fall River, which defendants had obstructed by erection of booms, fences and bridges, preventing plaintiff from boating, hunting and fishing in the stream. The court adopted a broad definition of navigability, holding that any waters which could be used for recreation were navigable and

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to preserve the right of commerce and navigation for the public. . . .

"There is no requirement that the state claim all land below high water mark. As long as the rights of the public are not impaired, the state may permit private ownership of land beneath non-tidal, navigable waters."

could be used by the public. In the course of its opinion, the court made the following statement, upon which Lyon relies: "[M]embers of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor-propelled small craft." (19 Cal.App.3d at p. 1050.)

We fail to see how Lyon can find comfort in this statement. It does not mean that the public's rights are confined to the waters as such, but merely attempts to distinguish between waters capable of commercial use—which were there claimed to be the test of navigability—and those capable of recreational use. Other cases cited by Lyon also fail to support his position.[18]

Nevertheless, argues Lyon, there is a sound reason in logic why tidal and nontidal waters should be treated

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[18]*Hitchings v. Del Rio Woods Recreation & Park Dist.* (1976) 55 Cal.App.3d 560 [127 Cal.Rptr. 830], was an action for declaratory relief to determine whether a certain portion of the Russian River was navigable. The court adopted the broad recreational use test of navigability set forth in *People* ex rel. *Baker v. Mack, supra,* 19 Cal.App.3d 1040, 1050, and held that the river was deemed in law to be navigable even though it was not in fact navigable for some part of the year.

In *Bohn v. Albertson* (1951) 107 Cal.App.2d 738 [238 P.2d 128], a tract of land was flooded when a levee broke. The flooding converted the land into a navigable body of water, upon which pleasure boats sailed and the public fished. It was held that the landowner could not charge the public for use of the water because while it was subject to recreational use it was a navigable body. However, the court held that the landowner had the right to reclaim the land since he had not lost title when it was suddenly flooded by the break in the levee, in accordance with the established rule governing avulsion.

differently insofar as these public's rights are concerned. He asserts that because tidelands are subject to inundation on a daily basis and nontidal waters are inundated only seasonally, tidelands are constantly subject to use for commerce, navigation and fishing, while the strip of land between low and high water in a nontidal body is only useful for such purposes for a limited portion of the year. Therefore, he concludes, the necessity for impressing nontidal waters with the public trust is greatly reduced.

But this contention is predicated on an exceedingly narrow view of the purposes of the public trust. As Justice McComb pointed out for a unanimous court in *Marks v. Whitney, supra,* 6 Cal.3d 251, 259, the public's rights in tidelands are not confined to commerce, navigation and fishing, but include recreational uses and the right to preserve the tidelands in their natural state. We discern no valid reason why the scope of the public's right in nontidal waters should not be equally broad. Lyon's assertions in this regard imply the resurrection of the common law distinction between tidal and nontidal waters —a distinction which has been thoroughly discredited in this country. As was said in *Illinois Central,* when the United States rejected the English rule that admiralty jurisdiction was confined to tidewaters because it was inapplicable to the conditions in this country, "the limitation and all its incidents were discarded." (146 U.S. 387 at p. 436 [36 L.Ed. 1018 at p. 1036].) We hold that the same incidents of the trust applicable to tidelands also apply to nontidal navigable waters and that the public's interest is not confined to the water, but extends also to the bed of the water.

In *California Fish* it was held that a statute authorizing the conveyance of tidelands will not be interpreted to abandon the public trust unless no other interpretation is reasonably possible. Nothing in the language of section 830 requires a conclusion that riparian landholders take free of the public's rights in the lands between low and high water in navigable lakes and streams. We conclude, therefore, that Lyon's title to such lands is impressed with the public trust.

Lyon's final argument is that his ownership of the Anderson Marsh to low water free of the public trust is a "rule of property" and that a determination applying a trust to such property would accomplish a taking of private property in violation of federal and state constitutional provisions. He relies upon cases which recognize the protection of property rights afforded by the federal and state Constitutions. (*Board of Regents v. Roth* (1972) 408 U.S. 564, 577 [33 L.Ed.2d 548, 561, 92 S.Ct. 2701]; *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 273-274 [157 Cal. Rptr. 372, 598 P.2d 25]; *House v. L.A. County Flood Control Dist.* (1944) 25 Cal.2d 384, 391 [153 P.2d 950].) (4) (See fn. 19.) We doubt whether any failure of the state to previously assert its trust rights in the lands below high water (but see 43 Ops. Cal. Atty. Gen., *supra*, 291, 294) constitutes a "rule of property."[19]

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[19]In *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 456 [328 P.2d 484], a "rule of property" was defined as "A settled rule or principle, resting usually on precedents or a course of decisions, regulating the ownership or devolution of property. . . . The principle appears to be an extension of the *'stare decisis'* rule, which . . . seems to apply with peculiar force and strictness to decisions which

Indeed, in some respects, our holding constitutes less of an interference with property rights than occurred in *Illinois Central, California Fish,* and *City of Berkeley.* In those cases, the landowners had received outright grants from the state, purportedly in fee, while the title of Lyon to the lands in issue here is based only upon administrative interpretation of an ambiguous statute. In *Illinois Central* the high court held that the grant of the lands in question was revocable—not merely that the railroad held the property subject to the trust—on the ground that "[t]here can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it." (146 U.S. 387, at p. 460 [36 L.Ed. 1018, at p. 1045].) And, in *California Fish,* in response to an argument by the grantees that the public should be estopped to claim any interest in the tidelands it had sold into private ownership, the court declared that the grantees had received title to the soil (subject to the public trust), and that they had "received consideration for their money, and it is to be presumed that they bought

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have determined questions respecting real property and vested rights. . . ."

Lyon's reliance on the "rule of property" which he espouses is open to question. The agreement under which he purchased Anderson Marsh provides that the seller does not warrant ownership of lands below zero mark on the Rumsey Gauge, and it makes provision to set aside some of the purchase monies in trust in the event a governmental body claims property above that point. Moreover, title insurance policies relating to the property except from coverage claims of the state to any portion of the property lying within the bed of the lake, any rights of the public for commerce, navigation or fishing, and any adverse claim to lands created by artificial means.

with knowledge of the law on the subject." (5) (See fn. 20.) In at least two jurisdictions in which the matter has been considered, the fact that the land between high and low water is owned by private parties is held not to prevent the imposition of the public trust to the high water mark. (*State v. Korrer, supra,* 148 N.W. 617, 623; *Flisrand v. Madson, supra,* 152 N.W. 796, 801.)[20]

We emphasize that Lyon is not deprived of the use of the lands between low and high water, and that he may utilize them in any manner not incompatible with the public's interest in the property.[21]

Let a writ of mandate issue directing the trial court to vacate its order granting Lyon partial summary judgment, and to grant the People's motion for partial summary judgment insofar as consistent with the views expressed above.

Bird, C. J., Tobriner, J., and Newman, J., concurred.

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[20]The People raise an additional question regarding the correctness of the trial court's ruling. The court determined that the appropriate boundary between public and private ownership is to be measured in accordance with the "last natural" ordinary low water mark of the lake, i.e., the water level in existence prior to the construction of a dam in 1914. The People argue that the proper standard of measure is the lake in its current condition. This issue is also presented in *State of California v. Superior Court (Fogerty)* (1981) *post,* at page 240 [—Cal.Rptr.—, —P.2d—], and it is discussed in the opinion in that case. We conclude that the position of the People is correct, and that the determination of the boundary between public and private ownership must be assessed in accordance with the shoreline of the lake as it exists presently.

[21]Lyon has moved to strike the People's "Replication to Answer to Petition for Writ of Mandamus" and an appendix to that brief. The People filed a motion to strike certain portions of the brief of amicus curiae California Land Title Association. These motions are denied.

**CLARK, J.**, Concurring and Dissenting.—The majority opinion overwhelmingly establishes that by statute, case authority and practice California historically has not claimed title to land between the high and low water marks of inland bodies of water. I thus concur in the majority holding that Lyon has fee title to lands above the low water mark of Clear Lake.

However, I must dissent from the holding that lands lying along navigable streams and lakes between high and low water levels are subject to the tidelands and submerged lands trust. That trust should be limited to tidelands as its name implies—lands covered and uncovered by the flow and ebb of the tide—and submerged lands. Historically, the trust has not been applied to land between high and low water mark on navigable lakes and streams (the shorezone). To the contrary, millions of acres have been reclaimed between high and low water for residential, agricultural, and general governmental uses—uses which would have been and are improper if the trust doctrine is applicable. History establishes it would have been against public policy—greatly impeding the development of the resources of our state—to have applied the trust doctrine. To apply that doctrine for the first time today casts clouds on thousands if not millions of land titles and uses, and jeopardizes agricultural and residential uses of millions of acres which are presently so used and are far more valuable for farm and home than for trust uses. While public recreational and ecological uses of the shorezone are important considerations, the state has and is providing for such uses. Application of the trust to millions of acres historically and

presently within the shorezone is overkill, contrary to public policy, and an inequitable infringement on long-settled and vested titles.

I. The Trust

The common law trust at issue has repeatedly been described by our courts as applying to tide and submerged lands. (E.g., *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 518-519, fn. 1 [162 Cal.Rptr. 327, 606 P.2d 362]; *Marks v. Whitney* (1971) 6 Cal.3d 251, 257, fn. 1 [98 Cal. Rptr. 790, 491 P.2d 374]; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 482 [91 Cal.Rptr. 23, 476 P.2d 423]; *San Diego County Archaeological Society Inc. v. Compadres* (1978) 81 Cal.App.3d 923, 925 [146 Cal.Rptr. 786].) The Clear Lake lands now at issue are not tidelands—they are not daily covered and uncovered by the flow and ebb of tide water. (See *Marks v. Whitney, supra,* 6 Cal.3d 251, 258; *People v. Kerber* (1908) 152 Cal. 731, 733 [93 P. 878].) Unlike tidelands the instant shorezone is uncovered for long periods of time—often the better part of a year. Tidelands unlike the instant lands are covered and uncovered twice each day by salt water, which—unlike the waters of Clear Lake—severely limits use of underlying lands for agricultural purposes. The instant shorezone land is obviously not submerged land.

Before considering historical matters requiring rejection of the majority's extension of the trust to shorezones, we should first consider the trust as it applies to true tide and submerged lands.

Tidelands and submerged lands owned by the state are held in trust for public purposes of navigation, commerce and fisheries. (*City of Long Beach v. Mansell, supra,* 3 Cal. 3d 462, 482; *People v. California Fish Co.* (1913) 166 Cal. 576, 584 [138 P. 79].) Tidelands subject to the trust may not be alienated into absolute private ownership; an attempted conveyance of such land transfers "only bare legal title," and the property remains subject to the public trust easement. (*Id.*) The decisions of this court have established that the trust is a limitation on governmental as well as private reclamation activities. (*City of Long Beach, supra,* 3 Cal.3d 462, 482-486; *Atwood v. Hammond* (1935) 4 Cal.2d 31, 38 [48 P.2d 20]; *City of Oakland v. Williams* (1929) 206 Cal. 315, 327-328, 330-331 [274 P. 328].)

The uses permitted within the trust are described in *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260 [98 Cal.Rptr. 790, 491 P.2d 374], as follows: "Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. [Citations.] The public has the same rights in and to tidelands. [¶] The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. [Citations.] There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their

natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorable affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands."

Permissible uses of tidelands whether by government or private citizens are numerous within the broad terms of the public trust for navigation, commerce, fishing and other purposes. For example, in *City of Oakland v. Williams* (1929) 206 Cal. 315, 319-323 [274 P. 328], this court upheld the use of such lands by a private party for a warehouse to be used for shipping, processing, and packing dried fruits. (See *Atwood v. Hammond* (1935) 4 Cal.2d 31, 40 [48 P.2d 20].)

Nevertheless, there are certain common land uses which are not included within trust uses, namely, residential, agricultural, and general governmental. Individuals as well as government may enforce the trust. (*Marks v. Whitney, supra*, 6 Cal.2d 251, 261-262.)

Reclamation of tidelands does not in and of itself terminate the public trust. (*Marks v. Whitney, supra*, 6 Cal. 3d 251, 261; *City of Long Beach v. Mansell, supra*, 3 Cal. 3d 462, 483; *Newcomb v. City of Newport Beach* (1936) 7 Cal.2d 393, 402 [60 P.2d 825]; *Atwood v. Hammond* (1935) 4 Cal.2d 31, 40-41 [48 P.2d 20].) However, if the Legislature finds and determines that particular lands are no longer useful for trust purposes, it may free them from the trust. (*Marks v. Whitney, supra*, 6 Cal.3d 251, 260; *City of Long Beach v. Mansell, supra*, 3 Cal.3d 462, 482.)

Statutes purporting to terminate the public use will be carefully scanned to determine whether that was the legislative intent. (*City of Berkeley v. Superior Court, supra,* 26 Cal.3d 515, 525.)

## II. The Shorezone Historically

We were taught in elementary schools that geographical conditions encountered by early settlers of our great California valleys were significantly different from those presently existing. Winter and spring rains and snows melting in the Sierras created great inland seas in the center of California. The width of rivers measured by feet in summer extended to miles during parts of the spring.[1] While the land regularly covered by water was as rich as any in the world, it could only be effectively farmed after the water receded. The flooding and short growing season limited production of crops and improvements which could be made.

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[1]Historically, the Sacramento River has carried off the annual spring flow of seasonal rains and melting snows which arise in surrounding mountains. Large basins were formed as vast amounts of water regularly overflowed river banks. During spring seasons, the total basin covered 1,250 square miles and in extraordinary years 1,700 square miles. When spring flood waters evaporated, the most fertile and productive agricultural land was exposed. (See, Rep. of A Board of Engineers Upon Examination of Sacramento, San Joaquin, and Feather Rivers, Cal., H.R. Doc. No. 262, 59th Cong., 1st Sess., p. 6 (1905); Rolle, California: A History (1969) pp. 370-371.) Similarly, the Fresno River (*Miller & Lux v. Madera Canal etc. Co.* (1909) 155 Cal. 59, 63-64 [99 P. 502], and the San Joaquin River (*Herminghaus v. So. California Edison Co.* (1926) 200 Cal. 81, 87-88 [252 P. 607]) have traditionally overflowed during the spring time to produce large marshland areas, which were subsequently highly productive.

Much of the history of California is tied to reclamation and farming of the state's rich bottom land. Such reclaimed lands have become some of the world's most productive farmland. Other large areas of reclaimed land have been used for urban development. For example, much of Sacramento is built upon reclaimed land. (E.g., *Gray v. Reclamation District No. 1500* (1917) 174 Cal. 622, 626-631 [163 P. 1024] (Sacramento and Feather Rivers); *Miller & Lux v. Madera Canal etc. Co.* (1909) 155 Cal. 59, 67 et seq. [99 P. 502] (San Joaquin River); *Modoc L. & L. S. Co. v. Booth* (1894) 102 Cal. 151, 153 et seq. [36 P. 431] (Pitt River).)

In addition to tracts now protected from flood waters there remain large tracts that—while flooded in winter and spring—are naturally drained and farmed in the summer and fall. For example, the Yolo Basin, which is used during the annual runoff to reduce flood pressure on other areas (see, *Gray v. Reclamation District No. 1500, supra,* 174 Cal. 622, 631), is an area of many square miles and is put to productive farm use when the waters recede.

Similarly, not all homes built within the shorezones are free from regular flooding. Thousands of such homes remain, for example, along the Russian River. These shorezone homes are regularly flooded.

The acres of reclaimed land which have been put to productive agricultural and residential use numbers in the millions. So far as I am aware, the Legislature has never found or determined such reclaimed lands useless for trust purposes or free of the trust. Indeed, it is by no means clear the Legislature could have found or could

now find such reclaimed lands or even the greater portion thereof useless for trust purposes when we remember that among such purposes are recreational and ecological uses. While the lands may be extremely valuable for agricultural and residential purposes, a balancing of values is not the test under the trust doctrine. The test is lack of value for trust purposes. In addition, it must be pointed out that the government exacted a ransom of $783,500 to clear the title of the homeowners in the subdivision in the asserted tidelands area involved in *City of Long Beach v. Mansell, supra,* 3 Cal.3d 462, 475.

The history of development of our great agricultural valleys and related residential development is directly in conflict with the asserted common law trust the majority seek to impose.

The majority trust doctrine is not merely in conflict with the private assertion of fee interest to reclaimed lands, but it is abundantly clear the state has encouraged and provided for such uses. One need only examine the three volumes of West Publishing Company's Appendix to our Water Code to note the collection of statutes enacted by our Legislature to establish reclamation districts which were obviously designed to further private agricultural use of reclaimed lands. While such districts may have also furthered navigational purposes on the concerned bodies of waters, it would be unreasonable to conclude that assessments against reclaimed lands to finance the costs of reclamation did not reflect increased values of properties as agricultural lands or that reclamation districts were not created with the intent the lands were to be used for agri-

cultural purposes. Further, numerous municipalities in historical shorezone areas have approved subdivisions for residential development and have provided residential services, all of which activities are in conflict with the majority's trust.

In concluding that in the past 130 years there has been a public policy to maintain land in its natural state or to limit historical shorezones to trust uses, the majority blind themselves to the historical development of controlling law. This law recognizes what highly productive members of our society undertook to forge, not only to serve their needs but also to serve the needs of society with the authorization, approval and encouragement over the years of our Legislatures, Governors, and local governmental agencies.

Application of the trust doctrine to the shorezone is contrary to California public policy. Rather than precluding farming and residential use of the shorezone, the policy has been to encourage reclamation and farming and residential use of these properties.

Protection of parts of our historic shorezone for the purposes permitted by the trust is a worthy endeavor but it should not be accomplished with a blunderbuss that confiscates thousands—perhaps millions—of titles, and jeopardizes existing use of millions of acres of residential and farm lands. While, as the majority recognize (*State of California v. Superior Court* (*Fogarty*), *post*, p. 240 [— Cal.Rptr. —, — P.2d —]), the state must compensate the landowner for improvements should it choose to exercise the trust and take property for park or other purpose,

it is not required to compensate for taking the land. From time immemorial landowners within the shorezone have conducted themselves in good faith as if they were owners in fee, and the land (apart from improvements) has been assessed and taxed as in the case of all fees not subject to the state's assertion of a right to take under a trust. To impose the trust at this late date on all property within the shorezone so that the state may take it without payment is confiscation and constitutionally impermissible.

In concluding that the trust doctrine must extend to the shorezone the majority rely mainly upon *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018, 13 S.Ct. 110] where the Supreme Court held that a grant of *submerged* lands in Lake Michigan was subject to the trust. (*Id.*, at p. 452 et seq. [36 L.Ed. at p. 1042 et seq.].) The court expressly recognized that it did not impose a trust on the shorezone. It stated: "If it be ascertained . . . and determined that such piers and docks do not extend beyond the point of practicable navigability, the claim of the railroad company to their title and possession will be confirmed; but if they or either of them are found on such inquiry to extend beyond the point of such navigability, then the State will be entitled to a decree that they, or the one thus extended, be abated and removed to the extent shown . . ." (*Id.*, at p. 450 [36 L.Ed. at p. 1041].) The court's order was to the same effect. (*Id.*, at p. 464 [36 L.Ed. at pp. 1046-1047].)

Far from serving as authority to extend the trust to freshwater shorezones, *Illinois Central Railway* reflects it is *only* navigable submerged lands that are subject to the trust.

I would deny mandate.

Richardson, J., concurred.

## APPENDIX A-2

In The Supreme Court of the State of California

S.F. No. 24035

THE STATE OF CALIFORNIA et al., Petitioners v. THE SUPERIOR COURT OF PLACER COUNTY, Respondent; CHARLES F. FOGERTY et al., Real Parties in Interest.

[Filed Mar. 20, 1981]

### OPINION

**MOSK, J.**—The present action is concerned with the ownership of lands between high and low water in Lake Tahoe, a navigable lake in which there is no appreciable ebb and flow of the tide. The primary issues are the same as those discussed in *State of California v. Superior Court (Lyon), ante,* page 210 [..... Cal.Rptr. ....., ..... P.2d .....], but some questions in addition to those in the *Lyon* action are raised by the parties.

In the spring of 1977, the State Lands Commission, after being advised by the Attorney General that the state claimed ownership of the property between high and low water in navigable nontidal lakes and rivers, proposed to record claims to such lands in the offices of county recorders throughout the state.

Thereupon, Charles and Stella Fogerty and other owners of property along the shore of Lake Tahoe, and Tahoe Shorezone Representation, a corporation which represents many shoreline owners, filed this action for declaratory relief and inverse condemnation, and claimed violation of

their civil rights (42 U.S.C. § 1983).[1] The complaint alleged that plaintiffs owned the lands between high and low water in the lake in fee simple, that many of them had built piers or docks extending to low water, and that the state wrongfully asserted title or a public trust t high water. Plaintiffs sought an injunction to prevent the s ate from claiming any interest in the property between high and low water. As defendants in the action, they joined the state, the State Lands Commission, and several state officials (hereinafter called the People).

After overruling the demurrers of the People and granting plaintiffs a preliminary injunction prohibiting the state from recording a notice that it owns the lands between high and low water in Lake Tahoe, the trial court granted plaintiffs' motion for partial summary judgment. It ruled that no portion of the property involved in this action landward of the last natural low water mark of Lake Tahoe is or ever was sovereign property of the state or subject to the common law public trust for commerce, navigation and fishing, and it denied the motions for partial summary judgment and for partial judgment on the pleadings filed by the People. Thereafter, the People filed this proceeding, seeking a peremptory writ of mandate to direct the trial

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[1]Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

court to vacate its order granting plaintiffs' motion, and to enter an order granting the motions made by the People.

The major issue raised by the plaintiffs, not discussed in *Lyon*, is that of estoppel. Strictly speaking, that issue is not formally before us. Plaintiffs' complaint pleads a cause of action for declaratory relief in estoppel, but their motion for partial summary judgment did not seek a ruling on this issue, and the trial court did not pass upon the question. The People, urging that plaintiffs should not be permitted to raise the issue, assert that estoppel is a question of fact for the trial court in any future proceeding. This argument is technically tenable. But if estoppel were to be determined on a case-by-case basis it would require a massive expenditure of time and money by the state, riparian landowners, and the judiciary. Such an effort may be avoided if, as we shall conclude, we can decide the question as a matter of law on the basis of the present record. (Cf. *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 487-488 [91 Cal.Rptr. 23, 476 P.2d 423].)

The elements of equitable estoppel were described so thoroughly by Justice Sullivan in *Mansell* that little more need be said on the subject.[2]

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[2]There are four elements necessary to apply the doctrine: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (3 Cal. 3d at p. 489.)

We note that the opinion of the Attorney General referred to in *Lyon* declares that the public trust applies to the land in question (43 Ops.Cal.Atty.Gen. 288, 294 (1964)), and that it has long been

Since we find that one critical requirement for the application of the doctrine is absent, we need not discuss other aspects of the doctrine or their relevance to the present case. Estoppel will not be applied to the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public (*Mansell*, 3 Cal.3d at p. 493), and we entertain no doubt that this would be the result if we were to hold that the People are barred from asserting the public trust in the lands at issue.

As we point out in *Lyon*, our decision will affect the rights of the public in 4,000 miles of shoreline along 34 navigable lakes and 31 navigable rivers, and many thousands of acres of land between high and low water (the shorezone). Amicus curiae in the *Lyon* action, the California Department of Water Resources, points out that the shorezone has been reduced to a fraction of its original size in this state by the pressures of development. Such lands now cover less than one half of 1 percent of the state; a further reduction by 15 percent was projected for 1980. Some authorities have warned that at the present rate of destruction nearly all riparian vegetation on the Sacramento River could be eliminated in the next 20 years.

The shorezone is a fragile and complex resource. It provides the environment necessary for the survival of numerous types of fish (including salmon, steelhead and

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settled in this state that the fact a private landowner has title to tidewaters does not establish such ownership is free of the interest of the public. (See, e.g., *People v. California Fish Co.* (1913) 166 Cal. 576 [138 P. 79].)

striped bass), birds (such as the endangered species: the bald eagle and the peregrine falcon), and many other species of wildlife and plants. These areas are ideally suited for scientific study, since they provide a gene pool for the preservation of biological diversity. In addition, the shorezone in its natural condition is essential to the maintenance of good water quality, and the vegetation acts as a buffer against floods and erosion.

The close relationship of the life forms in the shorezone to one another and to the condition of the bed of the stream or lake, the delicate balance among them, and the adverse effects of reclamation and development of these areas have been documented in numerous studies and reports. (E.g., U. S. Dept. of Agr., Forest Service (1973) Gen. Plan for Management of Nat. Forest Lands, Lake Tahoe Basin, Review Draft, Lake Tahoe Management Unit, South Lake Tahoe, pp. 1-2; Cal. Dept. Fish and Game (1974) Fish and Wildlife Res. of Anderson Marsh, Clear Lake, Lake County; Cal. Dept. Fish and Game (1966) 1 Fish and Wildlife Plan, p. 14.) One commentator has observed: "[T]he argument is now commonplace that these environments are the earth's most biologically productive . . . If nature bats last, wetlands may be the natural team's designated hitter." (*Nash, Who Loves a Swamp?* in Strategies for Protection and Management of Floodplain Wetlands, etc., a Symposium (USDA Forest Service, GTR-WO-12, Dec. 11-13, 1978.)) The recreational use of these areas for picknicking, hunting, fishing, hiking, birdwatching and nature study does not require elaboration to any Californian. In *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260 [98 Cal.Rptr. 790, 491 P.2d 374], Justice McComb made the following comment for a unanimous court regard-

ing the public uses of tidelands: "There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is a preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." That observation is equally applicable to the shorezone.

The Legislature has recognized the value of the shorezone by enacting statutes calling for its protection. (Pub. Resources Code, §§ 5093.50, 5811.) Section 5811 provides that "the remaining wetlands of this state are of increasingly critical economic, aesthetic, and scientific value to the people of California, and . . . there is need for an affirmative and sustained public policy and program directed at their preservation, restoration, and enhancement, in order that such wetlands shall continue in perpetuity to meet the needs of the people."

We are not convinced by the assertion that these considerations do not rise to the level of a strong public policy in favor of retaining the public trust in the shorezone. Plaintiffs argue that a large percentage of the shoreline of Lake Tahoe is presently devoted to public use either because of public ownership or the public utilization of privately owned shoreline facilities such as marinas, that the problems at Lake Tahoe are related to a large influx of people which contributes to the pollution of the lake, that the public beach areas are overused and the

forest cover destroyed by motor vehicles, and that the best preserved areas of the lake are in private ownership. Thus, they urge, the public interest in preservation of the scenic beauty of the lake would be enhanced by private rather than public ownership of the shorezone. Moreover, it is argued, owners are limited in their use of the shorezone by many regulations designed to protect the ecology of the area,[3] and these are adequate to protect the public's interest.

Amicus curiae, the California Land Title Association, in a brief filed in the *Lyon* action, asserts that the People exaggerate the ecological importance of the shorezone since not all shorezone areas are of ecological importance, some of the most significant being located above high water or below low water. It is also argued that the imposition of a trust on behalf of the public will not necessarily provide the ecological benefits which the People envision. That goal can be better accomplished on a project-by-project basis in which ecological concerns can be dealt with and private improvements prohibited, lim-

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[3]For example, state law requires mitigation of adverse environmental effects of a project (Pub. Resources Code, § 21000 et seq.), development which will obstruct the flow of a river or lake or which uses material from a stream bed must be approved by the Department of Fish and Game to determine whether it will adversely affect fish and wildlife (Fish & G. Code, § 1603); the California Tahoe Regional Planning Agency has broad powers to enact ordinances for the regulation of improvement at the lake (Gov. Code, § 67100), and 10 percent of the wetlands in the state are protected by a law providing for the formulation of a plan to control development of Suisun Marsh (Pub. Resources Code, § 29000 et seq.).

ited, or modified, depending on the ecological needs of the area involved.

Whether or not the shorezone of Lake Tahoe would be better preserved if privately owned than if the public has an interest therein is not determinative, since we are not concerned here with recreation only, nor with Lake Tahoe alone, but with a principle which will apply to 4,000 linear miles along all the navigable lakes and rivers in California, in many of which the conditions may well differ in some respect from those at Lake Tahoe. Preservation of the public trust in the shorezone will allow the state flexibility in determining the appropriate use of such land, so that, for example, areas which are endangered by overuse can be closed to certain activities such as public bathing. A number of the considerations advanced by plaintiffs and amicus would call also for abdication of the tidelands trust and the substitution of regulation of tidelands development for the concept of the public's right to control such lands as a matter of right. These arguments appear to oppose the established public trust doctrine in principle, rather than its application to the shorezone as such.

The exercise of the police power has proved insufficient to protect the shorezone. The urgent need to prevent deterioration and disappearance of this fragile resource provides ample justification for our conclusion that the People may not be estopped from asserting the rights of the public in those lands.

One question remains: whether the boundary between public and private ownership should be determined with reference to Lake Tahoe in its current condition, or the

"natural" level of the lake as it existed prior to the construction of a dam in 1870, which had the effect of raising the level of the lake. (See 30 Ops.Cal.Atty.Gen. 262, 267-268 (1957).) The trial court concluded that the appropriate boundary between public and private ownership is to be measured in accordance with the "last natural" low water mark of the lake. Plaintiffs argue in favor of the trial court's ruling, while the People assert that the boundary should be fixed by assessing the lake in its current condition.

There is no direct authority on this issue in California. While there is authority relating to a landowner's right to accretions and relictions[4] and to the maintenance of a body of water at its existing level,[5] the issue in the present case revolves around rights in land between the natural water level of a lake and its current shoreline as raised by a dam constructed many decades ago. The People point

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[4]Section 1014 of the Civil Code provides that where land forms by imperceptible degrees from natural causes upon a river or stream by accumulation of material or the recession of the stream, it belongs to the owner of the bank. In *Carpenter v. City of Santa Monica* (1944) 63 Cal.App.2d 772, 794 [147 P.2d 964], the court refused to apply this statute to tidelands, deciding that artificial accretions to tidelands belong to the state, because to hold otherwise would indirectly convey public tidelands into private ownership.

[5]Some cases hold that a landowner has a vested interest in a long-continued diversion of water by the state if he has made substantial expenditures in reliance upon the diversion (*Natural Soda Prod. Co. v. City of L. A.* (1943) 23 Cal.2d 193, 197 [143 P.2d 12]; *Chowchilla Farms Inc. v. Martin* (1933) 219 Cal. 1, 18 [25 P.2d 435]), and that he may recover damages if the level of a lake is lowered (*City of Los Angeles v. Aitken* (1935) 10 Cal.App.2d 460, 472 [52 P.2d 585]).

out that it would be difficult (and probably impossible in some cases) to reconstruct the natural water level of a lake. There are hundreds of dams in California, some dating back to the early days of statehood. (Dept. of Wat. Resources, Dams Within Jurisdiction of State of Cal. (1976) Bull. No. 17-76.) The monumental evidentiary problem which would be created by measuring the boundary line between public and private ownership in accordance with the water level which existed prior to the construction of these dams provides a convincing justification for accepting the current level of the lake as the appropriate standard.

Moreover, the dam at Lake Tahoe has been in existence since 1870, long past the period required for the acquisition of prescriptive rights by the state in the lands in question. (Civ. Code, § 1007; Code Civ. Proc., § 325.) It has been held in other jurisdictions that a landowner loses ownership of property covered by water resulting from the construction of a dam if the condition has continued for the period required for the acquisition of prescriptive rights. (*State v. Parker* (1918) 132 Ark. 316 [200 S.W. 1014, 1016]; *State v. Sorenson* (1937) 222 Iowa 1248 [271 N.W. 234, 238-239].) *Sorenson* stated that in these circumstances "the artificial condition is . . . stamped with the character of a natural condition, and the title to the lands covered by the waters of the lake is deemed to have passed from private ownership to the same trust as that of lands covered by the waters of natural navigable lakes. The state, and private owners, as well of lands affected by the artificial condition, may enforce the maintenance of that condition." (Cf. *Chowchilla Farms Inc. v. Martin*,

*supra*, 219 Cal. 1, 18; *Natural Soda Prod. Co. v. City of L. A., supra*, 23 Cal.2d 193, 197.)

We hold that, under all the circumstances, the trial court erred in its conclusion that the "last natural" low water mark of Lake Tahoe is the appropriate standard by which to measure the boundary between public and private ownership.

We emphasize, as we did in *Lyon*, that these plaintiffs may use the shorezone for any purposes which are not incompatible with the public trust. Landowners who have previously constructed docks, piers and other structures in the shorezone may continue to use these facilities unless the state determines, in accordance with applicable law, that their continued existence is inconsistent with the reasonable needs of the trust. In that event, both statute and case law require that plaintiffs be compensated for the improvements they have constructed in the shorezone. (Pub. Resources Code, § 6312; *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 455 [36 L.Ed. 1018, 1043, 13 S.Ct. 110]; *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 534 [162 Cal.Rptr. 327, 606 P.2d 362].)

Let a writ of mandate issue directing the trial court to vacate its order granting plaintiffs partial summary judgment, and to grant the People's motion for partial summary judgment and partial judgment on the pleadings, insofar as consistent with the views expressed above.

Bird, C. J., Tobriner, J., and Newman, J., concurred.

**CLARK**, J., Dissenting.—For the reasons stated in my concurring and dissenting opinion in *State of California v. Superior Court* (*Lyon*), *ante*, page 210, [..... Cal.Rptr. .....,

..... P.2d .....], the public trust declared today by the majority applies only to tide and submerged lands and does not apply to the shorezone. While the shorezone at Lake Tahoe may be a ring around the lake only a few feet in width, shorezones on navigable streams encompass hundreds of square miles which are presently in productive use for other than trust purposes, and we should not at this late date declare such uses unlawful.

I must also dissent from the majority's conclusion that the People may not be estopped from asserting the trust. The holding of the sole authority relied on by the majority, *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 [91 Cal.Rptr. 23, 476 P.2d 423], is directly contrary to today's decision.

In *Mansell,* the City of Long Beach had claimed portions of a residential subdivision were tidelands subject to the trust. Estoppel was urged on the ground: "[T]he subject lands were filled and improved with the knowledge and acquiescence of the state and city and . . . since annexation of the area in 1923 the city has exercised full municipal jurisdiction over it—granting building permits, approving subdivision maps, constructing and maintaining streets and city services, collecting taxes." (*Id.,* at p. 487.)

This court first discussed estoppel as applicable to private parties in land title cases, concluding that the circumstances would be sufficient to estop private claims. The court continued: "It is settled that '[t]he doctrine of equitable estoppel may be applied against the government where justice and right require it. (*United States Fid. & Guar. Co. v. State Board of Equalization* (1956) 47 Cal.2d

384, 388-389 [303 P.2d 1034] and cases there collected.)' (*Driscoll v. City of Los Angeles, supra,* 67 Cal.2d 297, 306 [61 Cal.Rptr. 661, 431 P.2d 245].) (See generally 28 Am.Jur.2d, Estoppel and Waiver, §§ 122-133, pp. 782-802; 31 C.J.S., Estoppel, §§ 138-147, pp. 675-733.) Correlative to this general rule, however, is the well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public, . . .' (*County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 829-830 [186 P.2d 124, 175 A.L.R. 747], see also cases there cited.) The tension between these twin principles makes up the doctrinal context in which concrete cases are decided." (*Id.,* at p. 493.)

After lengthy discussion of the leading cases on the issue of estoppel against government, *Mansell* distilled the controlling rule: "After a thorough review of the many California decisions in this area, as well as a consideration of various out-of-state decisions, we have concluded that the proper rule governing equitable estoppel against the government is the following: The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*Id.,* at pp. 496-497.)

The court concluded that the great injustice to homeowners which would result from failure to uphold an

equitable estoppel against the state and city justifies the minimal effect upon public policy resulting from raising an estoppel. (*Id.*, at p. 501.)

The majority in the instant case rely upon the language quoted above that "an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public, . . .'" The majority conclude that establishing trust rights to the shorezone is so important that the People may not be estopped as to thousands of linear miles of shorezone. (*Ante*, pp. .....)

The majority decision is arbitrarily contrary to *Mansell*. That case established that in appropriate circumstances the People could be estopped to assert the trust, when the resulting injustice would outweigh the public policy. There are no doubt, thousands of homeowners in cities of the Sacramento and San Joaquin Valleys, as well as other areas of the shorezone, in substantially the same position as were the homeowners in Long Beach. These homeowners, and thousands of farmers will suffer thousands of "great injustices," clearly outweighing the public trust loss in respect to individual lands. (3 Cal.3d at p. 501.)

While it would be a tremendous burden on the judicial system to determine in individual cases whether imposition of the trust involves "great injustice" outweighing trust detriment, the courts' business is the administration of justice. However burdensome the alleviation of "great injustice" may be, courts should not shirk their duty.

I would deny mandate.

Richardson, J., concurred.

## APPENDIX A-3

SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LAKE

No. 13925

RAYMOND R. LYON and MARGARET L. LYON,
Plaintiffs,

v.

THE STATE OF CALIFORNIA, et al.,
Defendants.

THE STATE OF CALIFORNIA, et al.,
Cross-Complainants,

v.

RAYMOND R. LYON, et al.,
Cross-Defendants.

COUNY OF LAKE,
Plaintiff in Intervention,

v.

RAYMOND R. LYON, et al.,
Defendants in Intervention.

ORDER PARTIALLY DENYING
AND PARTIALLY GRANTING
MOTIONS FOR SUMMARY JUDGMENT
(Code of Civ. Proc. § 437c)

[Filed Oct. 25, 1978]

Plaintiffs Raymond R. Lyon and Margaret L. Lyon having filed herein (on June 12, 1978) their motion for partial summary judgment, defendants State of California, acting by and through the State Lands Commission and the Attorney General of the State of California having filed herein (on July 6, 1978) their motion for partial summary adjudication, and plaintiff in intervention County of Lake having filed herein (on June 16, 1978) its motion for partial summary judgment;

IT IS ORDERED THAT:

1. Each of said motions is denied, except to the extent to which it is hereinafter granted.

2. Pursuant to the provisions of Code of Civil Procedure § 437c, the following matters shall be deemed established for all purposes of this action:

a. No portion of the property which is the subject of this action, lying landward of the last natural ordinary low water mark of Clear Lake, is sovereign property of the State of California.

b. No portion of the property which is the subject of this action, lying landward of the last ordinary low water mark of Clear Lake, is subject to the common law public trust for commerce, navigation and fisheries.

c. Lands underlying the waters of Clear Lake and lying waterward of the last natural ordinary low water mark of Clear Lake are held by intervenor County of Lake in trust for the People of the State of California by virtue of Chapter 639, Statutes of 1973, and defendant State of California is the owner of all rights in said lands reserved to it in said Chapter 639.

d. Lands underlying the waters of Clear Lake and lying water-ward of the last natural ordinary low water mark of Clear Lake are subject to the public trust for commerce, navigation and fishery.

e. The waters of Clear Lake, as, when, and to the extent that they rise above the last natural ordinary low water mark of Clear Lake and cover lands lying between the last natural ordinary low water mark and the last natural ordinary high water mark, are subject to a public servitude for navigation, the nature and extent of which shall be determined by the judgment in this action.

Dated: October 25, 1978.

JOHN J. GOLDEN
Judge of the Superior Court

## APPENDIX A-4

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE COUNTY OF PLACER

No. 48281

CHARLES F. FOGERTY, STELLA FOGERTY, RUSSELL S. GROVE, NANCY J. GROVE, HAROLD E. EBRIGHT, JR., KATHERINE FAIRLIE EBRIGHT, GEORGE HILTON EDMONDSON, JANET LOUISE EDMONDSON, LAURENCE L. LINDSEY, JR., ROSEMARY F. LINDSEY, HOMER H. HAYWARD, REID W. DENNIS, TAHOE MEADOWS, a California corporation and TAHOE SHOREZONE REPRESENTATION, a Nevada corporation,

Plaintiffs,

vs.

STATE OF CALIFORNIA; STATE LANDS COMMISSION OF THE STATE OF CALIFORNIA; KENNETH CORY, STATE CONTROLLER, CHAIRMAN OF THE STATE LANDS COMMISSION; MERVIN M. DYMALLY, LIEUTENANT GOVERNOR, COMMISSIONER OF THE STATE LANDS COMMISSION; ROY M. BELL, DIRECTOR OF FINANCE, COMMISSIONER OF THE STATE LANDS COMMISSION; WILLIAM F. NORTHROP, EXECUTIVE DIRECTOR OF THE STATE LANDS COMMISSION; GEORGE DEUKMEJIAN, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA; J. F. TROUT, MANAGER, LAND OPERATIONS OF THE DIVISION OF STATE LANDS; DOES I through X, inclusive.

Defendants.

## ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (CODE OF CIVIL PROCEDURE § 437c)

[Filed June 4, 1979]

Plaintiffs' motion for partial summary judgment, filed March 1, 1979, and defendants' motion for partial summary judgment, filed March 30, 1979, came on regularly for hearing before me on April 16, 1979. Edgar B. Washburn, William T. Chidlaw and Barbara L. Gately appeared as counsel for plaintiffs and Jan Stevens, David B. Judson and Stephen H. Mills appeared as counsel for defendants. The Court examined the declarations submitted in support of, and in opposition to, the respective motions, and the matter was argued and submitted to the Court.

The Court being fully advised herein, and good cause appearing therefor,

IT IS ORDERED that plaintiffs' motion herein is granted and the following matters are found to be without substantial controversy and shall be deemed established for all purposes of this action:

1. That no portion of the subject property landward of the last natural low water mark of Lake Tahoe is, or ever was, sovereign property of the State of California; and

2. That no portion of the subject property landward of the last natural low water mark of Lake

Tahoe is, or ever was, subject to the common law public trust for commerce, navigation and fisheries.

IT IS FURTHER ORDERED that defendants' motion herein is denied.

DATED: June 4, 1979

KEITH F. SPARKS

Keith F. Sparks
Judge of the Superior Court

## APPENDIX B

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SEE CONCURRING OPINION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR
THE THIRD APPELLATE DISTRICT
(Placer)

3 Civil 17381
(Super. Ct. No. 48281)

CHARLES F. FOGERTY, et al., Plaintiffs and Respondents,

v.

STATE OF CALIFORNIA, et al., Defendants and Appellants.

[Filed Mar. 28, 1979]

Defendants appeal from a preliminary injunction order. As will appear, without addressing the merits, we shall conclude that the trial court did not abuse its discretion in issuing the preliminary injunction.

The events leading to the injunction are as follows: by letter dated March 8, 1977, the Attorney General advised the State Lands Commission ("Commission") of the State's claim of sovereign ownership—to ordinary high-water mark—of the beds of non-tidal navigable lakes and streams throughout California. Pursuant to this advice, the State Lands Commission announced its intention to record notices of such claim in the counties where

navigable lakes and streams are located. Plaintiffs, alleging ownership interests in Lake Tahoe waterfront property, sought to restrain the Commission from recording such notices unless the notices consisted of a lis pendens filed in conjunction with a legal proceeding. As requested, the trial court issued a preliminary injunction prohibiting the Commission from recording such notices.

Defendants have the right to appeal from an order granting a preliminary injunction. (Code Civ. Proc., § 904.1, subd. (f).) However, the scope of inquiry on appeal is limited so that the reviewing court will not interfere with the trial court's order in the absence of a showing of clear abuse of discretion. (Weingand v. Atlantic Sav. & Loan Assn. (1970) 1 Cal. 3d 806; Continental Baking Co. v. Katz (1968) 68 Cal.2d 512; Porter v. Jennings (1891) 89 Cal. 440.) Nevertheless, the parties' briefs exhaustively argue the heart of the underlying dispute.

The substantive issue is whether the land between the ordinary high and low water marks along the shorelines of navigable lakes and streams is in State or private ownership. The State urges us to resolve this issue on this appeal from the preliminary injunction order. The trial court's issuance of a preliminary injunction order, however, neither attempts to adjudicate nor has the effect of adjudicating the merits of the ultimate controversy. (Patterson v. Board of Supervisors (1875) 50 Cal. 344; Socialist Workers etc. Committee v. Brown (1975) 53 Cal.App.3d 879.) Rather, it simply preserves the status quo pending trial (Continental Baking Co. v. Katz, supra, 68 Cal.2d at p. 534; People v. Black's Food Store (1940) 16 Cal.2d 59; West Coast Constr. Co. v. Oceano Sanitary Dist. (1971) 17 Cal.App.3d 693), so that final resolution on

the merits may not become ineffectual. (Froomer v. Drollinger (1960) 183 Cal.App.2d 787.) Here, then, the trial court's granting of the preliminary order succeeded in restraining the Commission's recording of notice without proceeding further to comment one way or another on the strength of opposing claims to the lakeshore property. (See Bomberger v. McKelvey (1950) 35 Cal.2d 607; Miller & Lux v. Madera Canal etc. Co. (1909) 155 Cal. 59.) Consequently, at this stage of the litigation, we as an appellate court do not determine the rightful owner of the lakeshore property, but properly confine ourselves to a review of the propriety of the trial court's issuance of the preliminary injunction against the Commission. (Continental Baking Co. v. Katz, supra, at p. 512; Patterson v. Board of Supervisors, supra, 50 Cal. 344; State Bd. of Barber Examiners v. Star (1970) 8 Cal.App.3d 736; French Art Cleaners v. St. Bd. etc. Cleaners (1949) 91 Cal.App.2d 890.)

The Supreme Court, in Continental Baking Co. v. Katz, supra, at page 528, has described the mechanics by which a trial court, in balancing the respective equities of the parties, decides whether to grant or deny a request for a preliminary injunction: ". . . the court examines all of the material before it in order to consider 'whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it; . . .' [ ations.] In making that determination the court will consider the probability of the plaintiff's ultimately prevailing in the case, and it has been said, will deny a preliminary injunction unless there is a reasonable probability that the plaintiff will be successful in the assertion of his rights. [Citations.] As was said in *Family Record Plan, Inc. v. Mitchell* (1959) 172 Cal.App.2d 235, 242 [342

P.2d 10], 'In the last analysis the trial court must determine which party is more likely to be injured by the exercise of its discretion [citation] and it must then be exercised in favor of that party [citation].' "

The preliminary injunction here preserved plaintiffs' existing claims to the property extending to the low water mark of Lake Tahoe. The State has demonstrated no significant injury that would result to it from a granting of the preliminary injunction order. On the other hand, plaintiffs have asserted that they would stand to incur substantial harm from a refusal of their request for a preliminary injunction. Based on respondents' reasonable likelihood of prevailing on the merits, the trial court, within the appropriate bounds of its discretion, could have concluded that denial of the preliminary injunction order would threaten to cloud title so as effectively to prevent respondents' transfer of the lakeshore property, or would otherwise threaten to interfere with any interests in the lakeshore property presently possessed by respondents.

Finally, we do not agree with State that it is beyond the reach of injunctive relief in the instant circumstance because the application of Civil Code section 830 to these facts is the very question in issue in this litigation. (Cf. Code Civ. Proc., § 526, subds. 4 and 6; Civ. Code, § 3423, subd. (4).)

The order granting the preliminary injunction is affirmed.

REYNOSO, J.

I concur:

PUGLIA, P.J.

Who owns the land between the ordinary low-water mark and the ordinary high-water mark along the shoreline of California's *non-tidal*[1] navigable waters, including Lake Tahoe? Is it the State or the bordering property owner?

From at least 1916, and until 1970, the Attorney General of California took the position that the State owned the beds of non-tidal navigable lakes and streams only to *ordinary low-water mark.* (Ops.Cal.Atty.Gen. 3100, pp. 5-6 (1916); 23 Ops.Cal.Atty.Gen. 97 (1954); 43 Ops.Cal.Atty. Gen. 291 (1964).) By its letter of March 8, 1977, however, the Attorney General advised the State Lands Commission that the State asserts, and since 1970 has been asserting, sovereign ownership of the beds of navigable lakes and streams to *ordinary high-water mark.* When the Commission thereafter announced its intention to record notice of the State's claims in the recorder's office of counties where such lakes and streams are located, certain owners of property bordering on Lake Tahoe filed this action and obtained the challenged preliminary injunction against such recordation.

I

The majority does not reach the merits of the controversy. My colleagues conclude that on appeal from the issuance of a preliminary injunction they need only decide whether there is a reasonable probability that plaintiffs will ultimately prevail and whether a greater injury will

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[1]Crucial to a proper understanding of this case is the constant awareness that only non-tidal waters are involved. As I note hereinafter, non-tidal and tidal waters are governed by separate and different rules of law.

result from granting the injunction than from denying it. That general proposition is both correct (Continental Baking Co. v. Katz (1968) 68 Cal.2d 512, 528) and applicable here; therefore I concur in the majority opinion. But unlike the majority, I am not prepared to end the matter thus. Because I view the ownership issue, on the merits, as a pure question of law with a very clear answer, in the interests of judicial economy, I would resolve it here and now. No further evidence or hearing in the trial court could possibly change the result.

II

California Civil Code section 670, as enacted in 1872 and amended in 1873-1874, states: "The State is the owner of all land below tide-water, and below ordinary high-water mark, bordering upon tide water within the State; of all land below the water of a navigable lake or stream; . . ."

This is clarified in Civil Code section 830, also enacted in 1872,[2] and amended in 1874 to read: "Except where the grant under which the land is held indicates a different intent, the owner of the upland (when it borders on tide-water) takes to ordinary high-water mark; *when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; . . .*" (Emphasis added.)

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[2]In its original form, section 830 provided:

"When land borders upon tide water, or upon water which constitutes an exterior boundary of the State, the owner of the upland takes to the high water mark; when it borders upon a navigable lake where there is no tide, the owner takes to the edge of the lake at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

Section 830 has been widely accepted as establishing ordinary low-water mark as the limit of California's sovereign lands beneath non-tidal inland navigable lakes and streams. In addition to such treatment in the line of Attorney General's opinions cited above, it has been so treated in a number of reported decisions, including Los Angeles v. Aitken (1935) 10 Cal.App.2d 460, 467; Crews v. Johnson (1962) 202 Cal.App.2d 256, 258; and United States v. Gossett (9th Cir. 1969) 416 F.2d 565. Moreover, I note from the limited record before us that certain of the conveyances of property bordering Lake Tahoe specifically describe the waterward boundary as the line of "ordinary low water." None of the conveyances in the record refer to high water.

The asserted rationale for the State's repudiation of its former position begins with an 1850 statute providing that ". . . unless inconsistent with applicable state law, the common law of England shall be the rule of decision." (Stats. 1850, ch. 95, p. 219; see now Civ. Code, § 22.2.) The Supreme Court in Lux v. Haggin (1886) 69 Cal. 255, 384-385 ruled: "The act of 1850 adopts the common law of England. . . . And the expression 'common law of England" designates the English common law as interpreted as well in the English courts as in the courts of such of the states of the Union as have adopted the English common law. . . . And it was not the common law 'as the same was administered' at a certain date that it was adopted, but the common law. . . . The statute adopts the common law of England except where inconsistent with the constitutions and statutes, and there can be no good reason why, to ascertain the common

law of England, we should not refer to the decisions of English and American courts (in states where the common law prevails) rendered before and subsequent to the date of the statute."

The State then argues that pursuant to this definition the "common law" rule in 1850 (or at least prior to the enactment of section 830 in 1872) was sovereign ownership of non-tidal inland navigable lake and stream beds to ordinary high-water mark; once California adopted the high-water mark standard by "common law" incorporation, the subsequently enacted section 830 was but a "rule of construction of boundaries," in view of the introductory clause "[e]xcept where the grant . . . indicates a different intent." By its terms, the argument continues, section 830 does not purport to grant the State's sovereign lands and thus for sound policy reasons it cannot be construed as a *grant*, citing *inter alia*, People v. California Fish Co. (1913) 166 Cal. 576.

The State errs in its initial hypothesis. The common law was not sovereign ownership to high-water mark.

The earliest United States Supreme Court case to associate inland "navigable water" (and "high water") with title was Barney v. Keokuk (1876) 94 U.S. 324. In that landmark decision, the court summarized the American view of the common law of England on the subject: "By the common law, . . . [all lands beneath] navigable waters belong to the Crown; but as the only waters recognized in England as navigable were tide waters, the rule was often expressed as applicable to tide-waters only, . . ." (*Barney, supra* at p. 337.) The court then pointed out that the

reason for the rule was equally applicable to nontidal navigable waters, ". . . that reason being, that the public authorities ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience. . . ." (*Barney, supra* at p. 338.)

The court went on: "The confusion of navigable with tide-water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation, in many States, of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. *Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine.* If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in Martin v. Waddell [(1842) 41 U.S. 367], Pollard v. Hagan [(1845) 44 U.S. 212], and Goodtitle v. Kibbe [(1850) 50 U.S. 471]. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of Genesee Chief v. Fitzhugh [(1851) 53 U.S. 443], has declared that the Great Lakes and other navigable waters of the country, above

as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. *It properly belongs to the States by their inherent sovereignty,* and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water." (*Barney, supra* at p. 338.) (Emphasis added.)

Thus Barney v. Keokuk held in 1876 that the States may or may not assert sovereign ownership over the beds of inland navigable lakes and streams to high-water mark; it also made clear that the English common law of high water applied to tidal waters only, even though logically it should have applied as well to non-tidal waters. At the time *Barney* was decided, California Civil Code section 830 had been in effect for four years, thus reflecting California's option to claim title only to the low-water mark.

Prior to *Barney*, we know of only one state, Iowa, which had clearly asserted a claim of high-water ownership. The claim was upheld by the Iowa Supreme Court in McManus v. Carmichael (1856) 3 Iowa 1, and it was a later challenge to this unique Iowa rule which brought about Barney v. Keokuk.

In an effort to expand the reach of *McManus* beyond the borders of Iowa, the State cites an 1868 text, Houck, *A Treatise on the Law of Navigable Rivers* (1868) pages 118-119, quoting as follows: "In investigating the cases, it will be noticed, that some of the courts, while they repu-

diate the supposed Common Law as inapplicable to our great inland rivers, and consider them as navigable in the highest and broadest sense, yet carry the ownership of proprietor of the verge of the bank to low-water mark, thus neither following the Common Law, nor wholly abrogating it. There is no authority in the Common Law for any such distinction. If rivers are navigable, the owners go to high-water mark only; if not navigable, they belong to the riparians; and these views the courts of New York and Iowa hold as applicable to the Mississippi and Mohawk." I find this unpersuasive. The treatise refers to two cases, *McManus* and The People v. The Canal Appraisers (1865) 33 N.Y.Ri (6 Tiffany) 461. *McManus* clearly supports the argument; *Canal Appraisers* does not, though it relies on *McManus* and can easily be misinterpreted as a "high water" case. In actual fact it holds only that the bed of the Mohawk River belongs to the State, without explicit reference to high or low-water mark. Other New York cases decided both before and after *McManus* clearly establish New York as a "low water" jurisdiction. (See Stewart v. Turney (1923) 237 N.Y. 117, 142 N.E. 437, 31 A.L.R. 960, 967; Canal Commissioners v. People (N.Y. 1830) 5 Wend. 423, 467; Champlain And St. Lawrence Rail Road Co. v. Valentine (N.Y. 1853) 19 Barb. 484; Ransom v. Schaeffer (1934) 153 Misc. 199, 274 N.Y.S. 570.)

We are left then with Iowa as the only American jurisdiction to adopt a "high-water mark" rule regarding non-tidal waters prior to 1872. On the other hand, a great many states during this time either made *no* sovereign claims on the beds of non-tidal waters, or claimed only to low-water mark. (See e.g., Delaney v. Boston (1839) 2 Del.

(2 Harr.) 489; Jones v. The Water Lot Co. of Columbus (1855) 18 Ga. 539; Middleton v. Pritchard (1842) 4 Ill. (3 Scam.) 510; Berry v. Snyder (1867) 66 Ky. (3 Bush) 266; Brown v. Chadbourne (1849) 31 Me. 9; Browne v. Kennedy (Md. 1821) 5 Harris 195; Commonwealth v. Chapin (1827) 22 Mass. (5 Pick.) 199; Norway Plains Co. v. Bradley (1872) 52 N.H. 86; Cobb v. Davenport (1867) 32 N.J.L. 369; Palmer v. Mulligan (N.Y. 1805) 3 Caines R. 307; June v. Purcell (1881) 36 Ohio St. 396; State v. Columbia (1887) 27 S.C. 137; Miller v. Mann (1882) 55 Vt. 475; Canal Commissioners v. The People, supra, 5 Wend. at pp. 466-467; West Roxbury v. Stoddard (1863) 89 Mass. (7 Allen) 158; Carson v. Blazer (Pa. 1810) 2 Binney 475, 479; Naglee v. Ingersoll (1847) 7 Pa. 185.) As pointed out by plaintiffs, even now the majority of American states do not claim high-water mark ownership. To illustrate, I append hereto a copy of Appendix A to plaintiffs' brief, which the State has not challenged.

As for English common law, although the distinction between tidal and non-tidal waters was not nearly as clear as early American writers contended, by 1868 the English courts accepted the American view of English law and held that the beds of non-tidal navigable waters were "prima facie" in private ownership. (Murphy v. Ryan (1868) 2 Ir. R.C.L. 143; see MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water.* 3 Fla. St. U.L.R. 511, 585-587 (1975).)[3]

[3]As *MacGrady* points out, "*Murphy v. Ryan* was an Irish case and thus was not technically binding on English courts. But it was cited and followed in England. . . . (3 Fla.St. U.L.R. 511, 585, fn. 390.)

The fact that one state adopted a high-water rule prior to 1872 certainly does not establish that rule as the "common law" for purposes of incorporation into California law.

III

The State argues that even if we do not accept the common law incorporation argument, upon achieving statehood in 1850 the State must have succeeded to all the sovereign lands theretofore possessed by the United States; and since Barney v. Keokuk established that federal sovereignty extended to high water, the State must have succeeded to the same ownership. Once again relying on the policy reasons expressed in such cases as People v. California Fish Co., supra, the State argues that section 830 cannot be construed as a *grant* of hundreds of miles of sovereign shoreline to unnamed private owners.

The simple answer again is that *Barney* was not decided until 1876, and thus cannot be relied upon to establish federal sovereignty in 1850.

Furthermore, commentators who have considered similar difficulties posed by divergent federal and state definitions of *navigability* have taken the position that grants of land are not involved. Title simply "springs" to the private owner by operation of law: "Of course, if W is navigable under the federal test, the state takes title by sovereignty, which title can later spring to O [the private owner] under *Barney* if W is nonnavigable under the state test." (MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Impor-*

*tance, and Some Doctrines That Don't Hold Water*, supra at p. 603.)

I honor the language of section 830 and would hold that California's sovereign title to the beds of navigable nontidal lakes and streams extends to the ordinary low-water mark. Above that the shoreline is owned by the owners of the adjoining upland. Accordingly I conclude on the merits that the preliminary injunction was properly granted.

IV

Having enunciated my conclusion, I briefly explain some of the arguably contrary cases cited by the State.

A. A contrary dictum in Churchill Co. v. Kingsbury (1918) 178 Cal. 554, 558, relied upon in 52 California Jurisprudence Second, Waters, section 800, page 448, was based upon a stipulation of the parties. The case did not consider Civil Code section 830[4] and has never been followed. A later Supreme Court case, Craig v. White (1921) 187 Cal. 489, 491-492, held that a United States patent of property along the shore of Clear Lake "under the established rules governing such transfers, conveyed title to the patentees to the *actual margin of the lake.* (Civ. Code, § 830 . . . .)" (Emphasis added.) The court's ensuing citation to Civil Code section 830 compels an interpretation of the emphasized phrase consistent with the language of the statute; i.e., margin (edge) of the lake *"at low-water mark."*[5]

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[4]See 43 Opinions of the California Attorney General (1964) 291, 295, noting that the *Kingsbury* briefs also did not mention section 830.

[5]*Craig's* language and citation to section 830 were later quoted with approval in Anderson v. Trotter (1931) 213 Cal. 414, 421.

Moreover, cases which subsequently dealt with title to the very property involved in the *Churchill* decision concluded that the land in question *was not* sovereign property, but swamp and overflow land subject to conveyance by the State into private ownership in fee simple absolute. (Reynolds v. Churchill Co. (1921) 187 Cal. 543; Franklin v. Churchill Co. (1921) 187 Cal. 555; Franklin v. Churchill Co. (1925) 73 Cal.App. 304.)

B. The United States Supreme Court in Hardin v. Jordan (1891) 140 U.S. 371, 382-383, after discussing the Iowa high-water rule upheld in Barney v. Keokuk, supra, inaccurately stated, "The same view was taken in quite a recent case with regard to titles on the Sacramento River under the law of California," citing Packer v. Bird (1886) 71 Cal. 134. Actually, the one-page opinion in *Packer* simply held that the adjoining landowner's title extended "no farther than the edge of the stream." (71 Cal. at p. 135.) The court did not discuss what it meant by "edge of the stream," because the dispute involved title to an island in the center of the river. But since the major issue in the case was whether the 1872 or 1874 version of section 830 applied (under the 1872 version the upland owner along a navigable *stream* presumably took title to the *middle* of the stream[6]), the court's use of the statutory language "edge of the stream" must be taken to mean "edge of the . . . stream, at low-water mark."

The United States Supreme Court later reviewed the *Packer* decision (Packer v. Bird (1891) 137 U.S. 661),

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[6]This is apparent from reading the briefs of the parties in *Packer*, which were provided to the trial court and are therefore in the clerk's transcript.

but did not discuss its statement in *Hardin* that the case established a high-water rule. Rather it quoted the ambiguous "edge of the stream" language, even though that language was of no value in the court's formulation that title ". . . will be limited according to the law of the State, either to low or high-water mark, or will extend to the middle of the stream." (*Id.* at pp. 669-670.)

V

Plaintiffs necessarily concede "that a limited public easement for recreational navigation exists over waters which are navigable for recreational purposes, even though the waters may inundate private property. *Bohn v. Albertson,* 107 Cal.App.2d 738, 742-743, 752-753 (1951); *People Ex Rel* [*sic*] *Baker v. Mack,* 19 Cal.App.3d 1040, 1060 (1971); *Hitchings v. Del Rio Woods Recreation and Park District,* 55 Cal.App.3d 560, 571. . . ." The judicial definition of navigability is sufficiently flexible to insure that the public interest will be protected. (See the "contemporary test" referred to in 45 Cal.L.Rev. 604, 617 (1957); i.e., can it "float a Supreme Court opinion.") The "public trust" doctrine also lurks here. (See generally Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention* (1970) 68 Mich.L.Rev. 473.) The possible argument that the public easement or public trust doctrines include the right of the public to use the strip of land between high and low water during periods of low water has been rejected in New York and Wisconsin (see 31 A.L.R. 960 (1924)), but remains viable (see cases and comments collected in *MacGrady, supra,* 3 Fla.St. U.L.R. at p. 615, fn. 553).

But these issues are not yet before us and I express no opinion thereon. I mention them only to point out that they are consequential matters whose ultimate resolution will be further delayed by the majority's unwillingness at this time to meet squarely the legal issue of this case.

PARAS J.

*Appendix A*

## THE LIMIT OF SOVEREIGN CLAIMS TO LANDS UNDERLYING NONTIDAL NAVIGABLE WATERS

| State | Limit of Sovereign Claim to Bed | Authorities |
|---|---|---|
| Alabama | Low-water mark | *Mobile Transp. Co. v. City of Mobile* (1907) 152 Ala. 409 [44 So. 976]; *Webb v. City of Demopolis* (1892) 95 Ala. 116 [13 So. 289] |
| Alaska | High-water mark | Alaska Stats. § 38.05.365; *State Dept. of Natural Resources v. Pankratz* (1975) 538 P.2d 984. |
| Arizona | Probably high-water mark | *State v. Bonelli Cattle Company* (1972) 180 Ariz. 258 [495 P.2d 1318], *rev'd on other grounds* (1973) 414 U.S. 313 [94 S.Ct. 517] |
| Arkansas | High-water mark | *U. S. Gypsum Co. v. Uhlhorn* (E.D.Ark. 1964) 232 F.Supp. 994; *Anderson v. Reames* (1942) 161 S.W.2d 947; *Harrison v. Fite* (8th Cir. 1906) 148 F. 781 |
| Colorado | No policy | Declaratory relief action currently pending in federal district court in Colorado to determine who owns the bed of Grand Lake—the city, the state or the federal government |
| Connecticut | Low-water mark | *New York, N. H. & H. R. Co. v. Armstrong* (1918) 92 Conn. 349 [102 A. 791] |
| Delaware | Low-water mark | Delaware Stats. § 6151; *State ex rel. Buckson v. Pennsylvania Railroad Co.* (1969) 267 A.2d 455, *aff'd*, 273 A.2d 268 (1971) |
| Florida | High-water mark | Florida Stats. § 253.12; *Martin v. Busch* (1972) 93 Fla. 535 [112 So. 274] |
| Georgia | Low-water mark | Georgia Stats. § 85-1304; *Johnson v. State* (1902) 40 S.E. 807 |
| Hawaii | Privately owned | Hawaii Stats. § 205-31;* *United States v. Kaiser Aetna* (D.Haw. 1976) 408 F.Supp. 42 |

| State | Limit of Sovereign Claim to Bed | Authorities |
|---|---|---|
| Idaho | High-water mark | Idaho Stats. § 58-104; *Gasman v. Wilcox* (1934) 54 Idaho 700 [35 P.2d 265]; *Burrus v. Edward Rutledge Timber Co.* (1921) 34 Idaho 606 [202 P. 1067]; *Northern Pac. Ry. Co. v. Hirzel* (1916) 29 Idaho 438 [161 P. 854] |
| Illinois | 1. *Streams and Rivers:* privately owned | *City of St. Louis v. Rutz* (1891) 138 U.S. 226 [11 S.Ct. 337]; *Trustees v. Schroll* (1887) 120 Ill. 509 [12 N.E. 243] |
| | 2. *Meandered Lakes:* "waters edge" or low-water mark | Ill. Stats., Ch. 19, § 71; *Peoria v. Central Nat. Bank* (1906) 224 Ill. 43 [79 N.E. 296—"water's edge" construed to be low-water mark]; *Seaman v. Smith* (1860) 24 Ill. 521 ["water's edge" construed to be the line at which the water usually stands when free from disturbing causes] |
| Indiana | Low-water mark | *Irvin v. Crammond* (1915) 58 Ind.A. 540 [108 N.E. 539]; *Sherlock v. Bainbridge* (1968) 41 Ind. 35 [35 Am. Rep. 302] |
| Iowa | High-water mark | *Mather v. State* (1972) 200 N.W.2d 498; *Peck v. Alfred Olsen Construction Co.* (1931) 238 N.W. 416; *Barney v. Keokuk* (1876) 94 U.S. 324; *McManus v. Carmichael* (1856) 3 Iowa 1 |
| Kansas | High-water mark | *Siler v. Dreyer* (1958) 183 Kan. 419 [327 P.2d 1031] |
| Kentucky | Privately owned | *Walker v. Felmont Oil Corp.* (6th Cir. 1957) 240 F.2d 912; *City of Covington v. State Tax Commission* (1929) 21 S.W.2d 1010; *Hogan v. McMurtry* (1827) 21 Ky (5 T.B. Mon.) 181 |
| Louisiana | 1. *Streams and Rivers:* low-water mark | *State v. Placid Oil Co.* (1974) 300 So.2d 154, *cert. denied* 95 S.Ct. 784, *rehrg. denied* 95 S.Ct. 1343; Op. Atty.Gen. 1938-40, p. 715 |
| | 2. *Lakes:* high-water mark | *State v. Placid Oil Co., supra;* Op.Atty.Gen. 1938-40, p. 229; Louisiana Civil Code §§ 453, 455 and 457 |

| State | Limit of Sovereign Claim to Bed | Authorities |
|---|---|---|
| Maine | Low-water mark | Mass. Colonial Ordinance of 1641-47; *Brastow v. Rockport Ice Co.* (1885) 77 Me. 100; *Wood v. Kelley* (1849) 30 Me. 47 |
| Maryland | Privately owned | Maryland Stats. §§ 9-101 *et seq.*; *Bowie v. Western Maryland R. Co.* (1918) 133 Md. 1 [104 A. 461]; *Day v. Day* (1865) 22 Md 530; *Browne v. Kennedy* (1812) 5 H & J (Md.) 195 |
| Massachusetts | Low-water mark | Mass. Colonial Ordinance of 1641-47; *Atty. Gen. v. Revere Copper Co.* (1890) 152 Mass. 444 [25 N.E. 605]; *West Roxbury v. Stoddard* (1863) 7 Allen, 158 |
| Michigan | 1. *Great Lakes:* "waters edge" | Inland Lakes and Streams Act, Michigan Stats. §§ 11.-475(1) *et seq.*; *Hilt v. Weber* (1930) 252 Mich. 198 [233 N.W. 159]; *Ainsworth v. Munuskong etc. Club* (1909) 159 Mich. 61 [123 N.W. 802] |
| | 2. *Other navigable waters:* privately owned | *Nedtweg v. Wallace* (1926) 237 Mich. 14 [208 N.W. 51] |
| Minnesota | Low-water mark | *Mitchell v. City of St. Paul* (1948) 31 N.W.2d 46; *State ex rel. Jackson County v. District Ct.* (1920) 146 Minn. 150 [178 N.W. 595]; *Snyder v. Great Northern Ry. Co.* (1914) 127 Minn. 518 [148 N.W. 617] |
| Mississippi | Privately owned | *Culley v. Pearl River Industrial Commission* (1959) 108 So.2d 390; *Anderson-Tully Co. v. Tingle* (1948) 166 F.2d 224; *The Steamboat Magnolia v. Marshall* (1860) 39 Miss. 109 |
| Missouri | Low-water mark | *Conran v. Girvin* (1961) 341 S.W.2d 75; *Frank v. Goddin* (1906) 193 Mo. 390 [91 S.W. 1057]; *State ex rel. Citizens Electric Lighting & Power Co. v. Longfellow* (1902) 169 Mo. 109 [69 S.W. 374] |

| State | Limit of Sovereign Claim to Bed | Authorities |
|---|---|---|
| Montana | Low-water mark | Montana Stats. § 67-712; *United States v. Eldredge* (1940) 33 F.Supp. 337; *Herrin v. Sutherland* (1925) 74 Mont. 587 [241 P. 328] |
| Nebraska | Privately owned | *Nebraska v. Iowa* (1972) 406 U.S. 117; *U. S. v. Phillips* (1931) 56 F.2d 447 |
| Nevada | Low-water mark [boundary currently disputed by state] | *Shoemaker v. Hatch* (1878) 13 Nev. 261 |
| New Hampshire | 1. *Lakes of 20 acres or more:* high-water mark | New Hampshire Stats. § 271:20; *Whitcher v. State* 87 N.H. 405 [181 A. 549]; *State v. Great Falls Mfg. Co.* (1912) 76 N.H. 373 [83 A. 126] |
| | 2. *Rivers and Streams:* privately owned | *New Hampshire Water Resources Bd. v. Lebanon Sand & Gravel Inc.* (1967) 108 N.H. 254 [233 A.2d 828] |
| New Jersey | Low-water mark | *Baker v. Normanoch Association* (1957) 25 N.J. 407 [136 A.2d 645]; *Kanouse v. Stockbower* (1891) 48 N.J.E. 42 [21 A. 197] |
| New Mexico | No policy | New Mexico Attorney General's office has indicated that there are no navigable waters in that state |
| New York | Low-water mark | *Champlain & St. L. R. Co. v. Valentine* (1853) 19 Barb. (N.Y.) 484; *Canal Commissioners & Appraisers v. People* (1830) 5 Wend. (N.Y.) 447; *Ransom v. Schaeffer* (1934) 153 Misc. 199, 274 N.Y.S. 570; *Stewart v. Turney* (1921) 117 Misc. 398, 191 N.Y. Supp. 342, *rev'd on other grounds*, 197 N.Y.Supp. 81 (1922) |
| North Carolina | Low-water mark | *State v. Eason* (1894) 114 N.C. 787 [19 S.E. 88] |
| North Dakota | Low-water mark | North Dakota Stats. § 47-01-15; *Hogue v. Bourgois* (1955) 71 N.W.2d 47; *Gardner v. Green* (1937) 271 N.W. 775; *Roberts v. Taylor* (1921) 181 N.W. 622 |

| State | Limit of Sovereign Claim to Bed | Authorities |
|---|---|---|
| Ohio | 1. *Great Lakes:* low-water mark<br>2. *Other nontidal navigable waters:* privately owned | *Sloan v. Biemiller* (1878) 34 Ohio St. 492<br>*State ex rel. Brown v. Newport Concrete Co.* (1975) 44 Ohio App.2d 121 [336 N.E. 2d 453]; *State ex rel. Anderson v. Preston* (1963) 2 Ohio App.2d 244 [207 N.E. 2d 664] |
| Oklahoma | High-water mark | *State v. Noleg* (1914) 40 Okl. 479 [139 P. 943] |
| Oregon | High-water mark | Oregon Stats. §§ 274.005 *et seq.*; *Brusco Towboat Co. v. State, By and Through Straub* (1977) 567 P.2d 1037; *Hume v. Rogue* (1907) 51 Or. 237 [83 P. 391] |
| Pennsylvania | Low-water mark | *Shaffer v. Baylor's Lake Association* (1958) 392 Pa. 493 [141 A.2d 583]; *Miller v. Lutheran Conf. & Camp Ass'n* (1938) 331 Pa. 241 [200 A. 646]; *Pursell v. Stover* (1885) 110 Pa. 43 |
| Rhode Island | Privately owned (?) | The Rhode Island Attorney General's Office indicated that Rhode Island follows the common law test of navigability—however, that policy has never been judicially confirmed |
| South Carolina | Privately owned | *McDaniel v. Greenville Power Co.* (1913) 78 S.E. 980; *State v. City of Columbia* (1887) 3 S.E. 55 |
| South Dakota | Low-water mark | So. Dakota Stats. §43-17-2; *Hillebrand v. Knapp* (1937) 65 S.D. 414 [274 N.W. 821]; *State v. Deisch* (1917) 38 S.D. 560 [162 N.W. 365]; *Flisrand v. Madson* (1915) 35 S.D. 457 [152 N.W. 796] |
| Tennessee | Low-water mark | *Hurley v. American Enka Corp.* (E.D.Tenn. 1950) 93 F.Supp. 98; *Webster v. Harris* (1902) 111 Tenn. 668 [69 S.W. 782]; *Martin v. Nance* (1859) 40 Tenn. (3 Head) 649 |
| Texas | "Gradient Boundary" | *Heard v. Town of Refugio* (1937) 103 S.W.2d 728; *Diversion Lake Club v. Heath* (1935) 86 S.W.2d 441 |

| State | Limit of Sovereign Claim to Bed | Authorities |
|---|---|---|
| Utah | High-water mark/ meander line | *Utah v. U. S.* (1971) 403 U.S. 9 [91 S.Ct. 1775—meander line]; *Provo City v. Jacobsen* (1947) 111 U. 68 [181 P.2d 213—High-water mark]; *State v. Rolio* (1927) 71 U. 91 [262 P. 987] |
| Vermont | Low-water mark | *Donahue v. Conant* (1929) 102 Vt. 108 [146 A. 417]; *Hazen v. Perkins* (1918) 92 Vt. 414 [105 A. 249]; *Jakeway v. Barrett* (1865) 38 Vt. 316 |
| Virginia | Low water mark | Virginia Stats. § 62.1-2; *U.S. v. Smoot Sand & Gravel Corp.* (1957) 248 F.2d 822; *Taylor v. Commonwealth* (1904) 102 Va. 759 [47 S.E. 875]; *McDonald v. Whitehurst* (1891) 47 F. 757 |
| Washington | High-water mark | Constit, Art. 17, § 1; *Wilbour v. Gallagher* (1969) 77 Wash.2d 306 [462 P.2d 232]; *State ex rel. Ham v. Superior Court* (1912) 70 Wash. 442 [126 P. 945]; *Van Siclen v. Muir* (1907) 46 Wash. 38 [89 P. 188] |
| West Virginia | Low water mark | *Carpenter v. Ohio River Sand & Gravel Corp.* (1950) 134 W.Va. 587 [60 S.E.2d 212]; *Campbell Brown & Co. v. Elkins* (1956) 93 S.E. 2d 248; *Union Sand & Gravel Co. v. Northcott* (1926) 102 W.Va. 519 [135 S.E. 589] |
| Wisconsin | 1. *Lakes:* high-water mark | *Mayer v. Grueber* (1965) 29 Wis.2d 168 [138 N.W.2d 197]; *Doemel v. Jantz* (1923) 180 Wis. 225 [193 N.W. 393]; *Illinois Steel Co. v. Bilot* (1901) 109 Wis. 418 [84 N.W. 855] |
| | 2. *Rivers and Streams:* privately owned | Wisc. Stats. § 30.10; *Angelo v. Railroad Commission* (1928) 217 N.W. 570 |
| Wyoming | No policy | According to the Wyoming Attorney General's Office, there are only two "navigable" bodies of water in that state and they are both federally owned and regulated |

# APPENDIX C

## ATTORNEY GENERAL'S OPINIONS

Opinion No. 63-13—June 12, 1964

SUBJECT: RIPARIAN BOUNDARIES—Private ownership of land abutting non-tidal navigable lakes and streams terminates at low water mark of the non-tidal navigable water, and land beneath such water is owned by the State.

Requested by: EXECUTIVE OFFICER, STATE LANDS COMMISSION

Opinion by: STANLEY MOSK, Attorney General
Anthony M. Summers, Deputy.

The Honorable F. J. Hortig, Executive Officer of the State Lands Commission, has requested the opinion of this office concerning the criteria to be used for locating low water mark on non-tidal navigable lakes and non-tidal navigable streams, the beds of which are owned by the State of California in its sovereign capacity. Specifically, the following questions were asked:

1. Is the same rule applicable to non-tidal navigable lakes and to non-tidal navigable rivers?

2. Does the low water mark refer to the lowest natural low water elevation which ever existed, or is it the lowest elevation which existed in each particular year, or is it an average of the low water elevations which existed each year?

3. If artificial influences have taken place, is the low water mark the elevation of low water at its lowest eleva-

tion immediately preceding the creation of artificial influences?

4. After once establishing which low water elevation is to be used under the foregoing questions, what criteria are to be used to determine how that elevation is to be established:

(a) maps;

(b) testimony of residents;

(c) contour of the river bed or lake bed;

(d) amount of water in the lake or flowing through the river, including the rise and fall of the water level;

(e) vegetation;

(f) soil composition of bed and banks of lakes or rivers?

The conclusions may be summarized as follows:

1. The rule for establishing riparian boundaries applies to both non-tidal navigable lakes and non-tidal navigable streams. That rule is that private ownership terminates at the low water mark of non-tidal navigable water, and the land beneath such water is owned by the state.

2. Low water mark refers to the elevation of low water in a normal season, not influenced by floods, droughts, or other special or unusual circumstances.

3. Where artificial influences have altered the low water mark, the last natural location of the low water mark should be used to fix the riparian boundaries. However, in some cases the low water mark created by the artificial influence may achieve the character of a natural low water

mark for the purpose of determining the level of water which riparians have the right to have maintained.

4. In establishing the elevation of the low water mark of a non-tidal navigable lake or stream any competent evidence may be used. This includes, but is not limited to, maps, historical data, testimony of residents or other eyewitnesses, and physical characteristics of the bed of the lake or stream together with characteristics of the adjacent terrain.

## ANALYSIS

1. *Rules Applicable to Lakes and Streams*

Not all of the questions submitted for opinion have been passed upon by the courts of the State of California. However, in determining those questions which have been presented, the courts do not appear to have made any distinction between non-tidal navigable lakes and non-tidal navigable streams insofar as riparian rights are concerned. Moreover, the courts of other jurisdictions have applied the same general principles of law to both navigable lakes and navigable streams.

California Civil Code section 670 sets forth the rule governing riparian boundaries on navigable non-tidal waters, and it specifically applies the same rule to both navigable lakes and navigable streams.[1] Thus, there is no

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[1]Civil Code section 670 provides:

"The State is the owner of all land below tide water, and below ordinary high-water mark, bordering upon tide water within the State; of all land below the water of a navigable lake or stream; of all property lawfully appropriated by it to its own use; of all property dedicated to the State; and of all property of which there is no other owner."

reason to believe that any distinction will be drawn between navigable lakes and navigable streams in determining the elevation or location of the boundary.

2. *Meaning of the Term "Low Water Mark"*

In order to determine the proper meaning of the term "low water mark" it is necessary to consider the basis for the sovereign's right to land below non-tidal navigable waters.

It has long been established that upon its admission into the Union, a state acquires title to the navigable waters within its territory, and to the land underlying such water. *Hardin v. Shedd,* 190 U.S. 508, 519 (1903); *Goodtitle v. Kibbe,* 50 U.S. (9 How.) 470, 477 (1850); *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 229 (1845).

This sovereign right is based upon the rights of the crown in England, which were brought to this country as part of the common law. In England, however, only waters which were tidal were considered to be navigable. For this reason there was some question in this country as to whether non-tidal navigable waters would become the property of the several states by virtue of their sovereignty, and some of the older states permitted the private ownership of lands underlying non-tidal navigable water. These states could have chosen to claim ownership of such land.

The Supreme Court of the United States has pointed out that the reason for giving the sovereign the right to control navigable tide-water is equally applicable to non-tidal navigable waters:

> ". . . that reason being, that the public authorities ought to have entire control of the great passage-ways of commerce and navigation, to be exercised for the public advantage and convenience. . . ." *Barney v. Keokuk,* 94 U.S. 324, 338 (1876).

The court went on to explain the development of the rule, and to establish the fact the state has the right to claim lands underlying non-tidal navigable waters:

> "The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principles were laid down in *Martin v. Waddell, . . . Pollard's Lessee v. Hagan, . . .* and *Goodtitle v. Kibbe. . . .* These cases related to tidewater, it is true; but they enunciate principles which are equally applicable to all navigable waters. . . ." *Ibid.*

Since the cases cited by the court held that the state owned all land below high water mark of tidal waters,

and since the same principle is to be applied to all navigable water, it is clear that the state may claim land below high water mark in non-tidal navigable lakes and non-tidal navigable streams. *Shively v. Bowlby*, 152 U.S. 1, 40, 58 (1894); *Sun Dial Ranch v. May Land Co.*, 61 Ore. 205, 119 Pac. 758 (1912); *Revell v. People*, 177 Ill. 468, 52 N.E. 1052 (1898). See also the Submerged Lands Act, confirming certain lands to the states and defining the term "lands beneath navigable waters" as

> ". . . all lands within the boundaries of each of the respective States which are covered by *non-tidal* waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, *up to the ordinary high water mark* as heretofore or hereafter modified by accretion, erosion, and reliction . . ." Submerged Lands Act, 67 Stats. 29 (1953) 43 U.S.C. § 1301 (a)(1) (1958 ed.) (Emphasis added.)

Thus, upon its admission to the Union, California acquired the title to all land below the high water mark of all navigable water within its territory, whether or not such water was tidal. This title is held in trust for the people of the State, in order to preserve the rights of commerce and navigation for the public. *Perry v. State*, 139 Cal. App. 2d 379, 380 (1956); Act for Admission of the State of California, 9 Stats. 452 (1850). See also *Hillebrand v. Knapp*, 65 S.D. 414, 274 N.W. 821, 822 (1937); *Flisrand v. Madson*, 35 S.D. 457, 152 N.W. 796, 800 (1915); *Cf.* Cal. Const. Art. XV, § 2.

There is no requirement that the state claim all land below high water mark. As long as the rights of the public are not impaired, the state may permit private ownership of land beneath non-tidal navigable waters. For this reason the riparian boundaries are determined by state law, whether the riparian acquired title from the state or from the United States:

> "When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision [as to ownership of the land underlying the lake] must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the State by its admission to the Union. Nevertheless it has become established almost without argument that in former case as in the latter the effect of the grant on the title to adjoining submerged land will be determined by the law of the State where the land lies. . . . When land under navigable water passes to the riparian proprietor, along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the State which does own it that it is attached to the shore." *Hardin v. Shedd,* 190 U.S. 508, 519 (1903). See also *Shively v. Bowlby,* 152 U.S. 1, 40, 58 (1894); *Packer v. Bird,* 137 U.S. 661, 669-70 (1891); *Railroad Co. v. Schurmeier,* 74 U.S. (7 Wall.) 272 (1868).

These cases make it clear that riparian boundaries are to be determined by state law. The California law is set forth in Civil Code section 670:

> "The State is the owner of all land below tide water, and below ordinary high-water mark, bordering upon tide water within the State; of all land below the water of a navigable lake or stream. . . ."

This is clarified in Civil Code section 830:

> "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; . . ."

It appears that California has chosen not to claim, as it might, all land below high water mark on non-tidal navigable waters; rather, it has altered the common law rule by permitting private ownership to extend to the low water mark. (See *Shively v. Bowlby*, 152 U.S. 1, 25 (1894), where a Georgia statute, similar to that of California Civil Code § 830, was considered a modification of the common law.) It is now settled law in California that private ownership extends to low water mark of non-tidal navigable waters. *Crews v. Johnson*, 202 Cal. App. 2d 256, 258 (1962); *City of Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 467 (1935); Civil Code section 830.

Language in *Yolo Water & Power Co. v. Edmands*, 50 Cal. App. 444, 447 (1920), seems to indicate that the State of California claims land underlying non-tidal navigable water to the high water mark. However, in that case the question of ownership was not actually decided, and the case cannot be considered as authority for claiming that

California owns land below the high water mark on a non-navigable lake or stream.

There is also language which is inconsistent with the provisions of Civil Code section 830 in *Churchill Co. v. Kingsbury,* 178 Cal. 554, 558 (1918), wherein the California Supreme Court held that the State of California owned the land underlying Little Klamath Lake up to the ordinary high water mark. However, the briefs submitted did not bring Civil Code section 830 to the attention of the court. Moreover the California court erroneously relied upon *Barney v. Keokuk,* 94 U.S. 324 (1876). While it is true that *Barney v. Keokuk* held that the several states have the *right* to claim ownership of all land below high water mark as an incident of their sovereignty, it also held that each state could decide whether or not to exercise that privilege.

It appears that the California Supreme Court did not consider the California law as set forth in Civil Code section 830, but decided *Kingsbury* upon the general principle of sovereign rights set forth in *Barney v. Keokuk.* Therefore *Churchill Co. v. Kingsbury* cannot be considered authority for claiming that the State of California owns all land below high water mark of non-tidal navigable waters. Despite *Kingsbury,* therefore, the rule set forth in Civil Code section 830 is the controlling law.

Since it is the law that private ownership terminates at the low water mark of a non-tidal navigable river or non-tidal navigable stream, the meaning of the term "low water mark" must be ascertained. No California case has been found which defines this term with regard to non-

tidal waters. As applied to tidal waters, the determination of low water mark involves a consideration of the daily fluctuations of the tide, and for this reason those decisions are not deemed applicable to non-tidal waters.

Other jurisdictions have considered the meaning of "low water mark" as applied to non-tidal waters, but they do not agree. Some states have held that the low water mark is the lowest elevation to which the waters have receded at any time. *Paine Lumber Co. v. United States,* 55 Fed. 854, 864 (E.D. Wis. 1893); *Joyce-Watkins Co. v. Industrial Comm'n.,* 325 Ill. 378, 156 N.E. 346, 348 (1927); *Carpenter v. Ohio River Sand & Gravel Corp.,* 134 W.Va. 587, 60 S.E. 2d 212, 215 (1950); *Union Sand & Gravel Co. v. Northcott,* 102 W.Va 519, 135 S.E. 589, 593 (1926). Other states have concluded that low water mark refers to the lowest elevation which the water reaches during a season which is not affected by droughts or floods. *Vermont v. New Hampshire,* 290 U.S. 579, 580 (1934); *Vermont v. New Hampshire,* 289 U.S. 593, 619-20 (1933); *Kentucky Lumber Co. v. King,* 65 S.W. 156 (Ky. 1901); *Stover v. Jack,* 60 Pa. (10 P. F. Smith) 339, 343 (1869); *Appeal of York Haven Water & Power Co.,* 212 Pa. 622, 62 Atl. 97, 98, 100 (1905); *Hillebrand v. Knapp,* 65 S.D. 414, 274 N.W. 821, 822 (1937); *Flisrand v. Madson,* 35 S.D. 457, 152 N.W. 796, 801 (1915); *McBurney v. Young,* 67 Vt. 574, 32 Atl. 492, 493 (1895); *Slauson v. Goodrich Transp. Co.,* 94 Wis. 642, 69 N.W. 990, 992 (1891).

A factor to be considered in determining which definition of the term "low water mark" should be applied, is that the State could have claimed the right to all land

below the high water mark of non-tidal navigable waters. By enacting Civil Code section 830 the California Legislature chose to relinquish part of this right. If low water mark is deemed to mean the lowest point to which the water recedes at any time, the ownership of the state will be curtailed to a greater extent than if the mark is set at the line of low water in a normal season.

It must be remembered that the state owns the beds of navigable lakes and streams in order to protect the public rights of commerce and navigation. Act for Admission of the State of California section 3, 9 Stats. 452 (1850). If low water mark were defined as the lowest elevation ever achieved by navigable waters, private riparian rights would be expanded solely because the waters recede in a year of record drought. This would interfere with the interests and policy of the state in promoting and controlling navigation. *Appeal of York Haven Water & Power Co.*, 212 Pa. 622, 62 Atl. 97, 98 (1905). It would leave the boundary uncertain, since a new precedent-breaking year is always possible.

For these reasons it is concluded that the term "low water mark" refers to the elevation of water in a non-tidal navigable lake or stream at its low point during a normal year, not affected by floods, droughts, or other special circumstances.

3. *Effect of Artificial Influences on Low Water Mark*

It has long been established that artificially caused accretions to tide lands will not deprive the state of the lands below the high water mark as it existed in its last natural state. See, *e.g.*, *Carpenter v. City of Santa Monica*

*et al.*, 63 Cal. App. 2d 772 (1944). This was also the rule at common law, although it may be changed by state law. *Barney v. Keokuk*, 94 U.S. 324, 337 (1876). While at common law the rule was applied only to tidelands, only tidal waters were considered navigable at the time the common law rule developed. Since non-tidal waters may now be recognized as navigable, there is no reason to apply a different rule to non-tidal navigable waters than that which is applied to tide water. *Barney v. Keokuk, supra.*

This conclusion is supported by California Civil Code section 1014:

> "Where, *from natural causes*, land forms by imperceptible degrees upon the bank of a river or stream, *navigable or not navigable*, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank." (Emphasis added.)

Thus the statute, by its own terms, limits the right of riparian owners to take advantage of accretions to their land only where they are the result of natural causes. See, *e.g.*, *Carpenter v. City of Santa Monica*, 63 Cal.App.2d 772, 787-88 (1944).

Whether the low water mark on non-tidal navigable water may be changed in contemplation of law by an artificial influence has been considered in other jurisdictions. At least one court has held that artificial influences will not change the low water mark. *Carpenter v. Ohio River Sand & Gravel Corp.*, 134 W.Va. 587, 60 S.E. 2d 212, 217 (1950); *Union Sand & Gravel Co. v. Northcott*, 102 W.Va. 519, 135 S.E. 589, 593 (1926). This rule was adhered to even though the artificial influences were dams and locks constructed by the

Federal Government. It seems clear that if the acts of the Federal Government cannot change the low water mark, then the acts of private individuals should not be permitted to do so.

A contrary rule would permit the acts of one individual, by changing the flow of the lake or stream, to affect the amount of land owned by other riparians. Such a rule would be likely to lead to excessive litigation, and would render riparian boundaries uncertain.

Therefore it is concluded that the low water mark is to be established according to its last natural elevation, not affected by artificial influences, such as dams or locks.

The boundary of a navigable lake or stream does not become fixed at the time the state acquires title. The rules of accretion, reliction, and erosion are applicable to navigable non-tidal waters. *City of Oakland v. Buteau,* 180 Cal. 83, 87 (1919); *Raglan v. Johnston Rock Co.,* 50 Cal. App. 2d 705, 708 (1942); Civil Code § 1014. However, in order for a riparian owner to acquire additions to his property due to accretion, it must be shown that the change is of a permanent nature. The normal seasonal change between high and low water is not of a sufficiently permanent nature to cause a change in boundaries. *Hillebrand v. Knapp,* 65 S.D. 414, 274 N.W. 821, 823 (1937); *Flisrand v. Madson,* 35 S.D. 457, 152 N.W. 796 (1915). This should not create any problem when the line of low water in a normal year is used to mark the boundary between private and state ownership.

Thus the boundary is fixed according to the low water mark, as modified by natural accretion, erosion, or reliction. *Cf.* Submerged Lands Act, 67 Stats. 29 (1953), 43 U.S.C.

§ 1301 (a)(1) (1958 *ed.*). In general, this boundary will not be changed in contemplation of law due to the effect of artificial influences.

Riparian owners have the right to have the natural level of a lake maintained. *City of Los Angeles v. Aitken,* 10 Cal. App. 2d 460, 467 (1935). It must, however, be recognized that in certain instances an artificially caused change in the water line of a lake or stream may come to be regarded as permanent. In such cases littoral or riparian owners may be permitted to treat the artificial level in the same manner as the natural elevation, and enjoin further changes. This situation would arise only where the artificial change has continued for a long period, probably in excess of the period for acquiring prescriptive title, and the change appears to be permanent in nature:

> "It is generally recognized that one who makes substantial expenditures in reliance on long-continued diversion of water by another has the right to have the diversion continued if his investment would otherwise be destroyed. . . . A change in the flow of a stream that appears to be permanent usually leads to costly adjustments by those interested, as they come to regard the artificial condition as permanent. It is therefore reasonable that they should receive as much protection as if the condition were natural. . . ." *Natural Soda Prod. Co. v. City of Los Angeles,* 23 Cal. 2d 193, 197 (1943). See also *Smith v. Youmans,* 70 N.W. 1115 (Wis. 1897), as to the application of this reasoning to lakes.

It appears from the language used in the *Natural Soda* case that the artificial condition would have to be in existence for a long period. Moreover, the riparian owners

would have to rely upon the artificial level in improving their land. Thus it appears that estoppel is the basis upon which riparian owners could enjoin future changes.

Under such circumstances it is possible that the artificial change would not result in a boundary change insofar as legal title is concerned, but if further changes in the artificially influenced water level could be enjoined, the practical effect would be to change the boundaries.

This situation is more fully discussed in 30 Ops. Cal. Atty. Gen. 262, 268-274 (1957).

4. *Evidence to be Used in Establishing Low Water Mark*

In establishing the elevation of low water mark of a nontidal navigable lake or stream, any competent evidence may be used. This includes but is not limited to maps, historical data, testimony of residents of other eye-witnesses, and the physical characteristics of the bed of the lake or stream, together with characteristics of the adjacent terrain.

The courts have considered all of these types of evidence in determining high and low water marks and navigability. *United States v. Utah,* 283 U.S. 64, 81-83 (1931) (in determining navigability the court referred to historical data, including records of individuals who had sailed on the river, and the size of the vessels used); *Howard et al. v. Ingersoll,* 54 U.S. 22 (13 How.) 381 (1851) (considered the line which the water left imprinted on the shore as determinative of high water mark); *State of Utah v. United States,* 304 F. 2d 23, 25-26 (10th Cir. 1962) (in determining navigability the court considered the testimony of eye-witnesses, experts, and films); *Mammoth Gold*

*Dredging Co. v. Forbes*, 39 Cal. App. 2d 739, 745-50 (1940) (in establishing high water mark the court considered testimony as to the existence of vegetation surrounding the water, government water measurements, the visible line washed on the shore, the contour of the river bed, soil composition, and the testimony of a resident of the area); *City of Peoria v. Central Nat'l. Bank*, 224 Ill. 43, 79 N.E. 296, 300-301 (1906) (in determining low water mark the court considered maps and eyewitness testimony); *Carpenter v. Ohio River Sand & Gravel Corp.*, 134 W.Va. 587, 60 S.E. 2d 212, 216 (1950) (in determining low water mark it was found proper to consider government charts and eye-witness testimony). It appears that all of these types of evidence may be used to determine the elevation of low water mark, but this should not be considered as an exhaustive list of competent evidence.

## CONCLUSION

Low water mark on a non-tidal navigable lake or non-tidal navigable stream should be established at the lowest elevation of the water in its last natural state during a normal year, free from drought or flood. Artificial influences should not be considered in establishing this mark unless the party responsible for the artificial influence is estopped from causing or permitting further change. All competent evidence should be considered in establishing the elevation of low water.

## APPENDIX D

[Letterhead]

STATE OF CALIFORNIA

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
STATE BUILDING, SAN FRANCISCO 94102
(415) 557-2544

March 8, 1977

Honorable Wm. F. Northrop
Executive Officer
State Lands Commission
1807 13th Street
Sacramento, California 95814

Re: Legal Boundaries of, and Public Rights in, Navigable Lakes and Nontidal, Navigable Rivers

Dear Mr. Northrop:

This is in response to your request that this office provide you with a written discussion of the position that we are taking on behalf of the State Lands Commission in litigation involving the legal boundaries of, and public rights in, navigable lakes and nontidal, navigable rivers.

As you know, we are representing the Commission in various cases in which these boundaries and rights are at issue. In general, since 1970, the State of California has been asserting sovereign ownership of the beds of such

lakes and rivers landward to the ordinary high-water mark.[1]

It is understood that for approximately seven years, the Commission has been acting consistently with this position in matters involving the State's title to the lands beneath inland navigable waters.[2]

In light of pending litigation concerning the legal boundaries of, and public rights in, Clear Lake, Donner Lake, Lake Tahoe and the Colorado River, it would be inappropriate to publish a detailed opinion now.[3] However, due to the widespread public interest in this subject, this letter is written to explain the rationale for the position being asserted by the State in such cases.

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[1]See, *e.g.*, retrial of *The People of the State of California v. Shasta Pipe and Supply Company*, Butte Co. Sup. Ct. No. 37390, following *People ex rel. Dept. Pub. Wks. v. Shasta Pipe etc. Co.*, 264 Cal. App. 2d 520 (1968); *Sacramento v. Commons Development Co., et al.*, Sacto. Co. Sup. Ct. No. 213340; *United States of America v. Martin G. Rock, et al.*, U.S.D.C.C.D. Cal. No. 71-262-HW Civil; *State of California v. Dart Industries, Inc.*, Nevada Co. Sup. Ct. No. 18595; *HKM Investments v. City of South Lake Tahoe, et al.*, El Dorado Co. Sup. Ct. No. 24285; *Jean Dufau v. Charles H. Moseley, et al.*, Placer Co. Sup. Ct. No. 43857; and *Raymond R. Lyon, et al. v. State of California, et al.*, Lake Co. Sup. Ct. No. 13925. In one instance in 1971, however, the State stipulated to a low-water boundary along a short stretch of the Sacramento River. *Leon St. Vrain, etc. v. State of California, et al.*, Shasta Co. Sup. Ct. No. 35714.

[2]As used herein, the phrase "*inland navigable waters*" denotes all navigable lakes and nontidal, navigable rivers.

[3]This office does intend to publish a notice in the Opinions of the Attorney General of California concerning the position being asserted in such litigation.

The question of whether the ordinary high-water mark or the ordinary low-water mark constitutes the legal boundary between the publicly owned beds of California's inland navigable waters and the adjoining uplands is a difficult and controversial issue. This question has become more significant recently because of the expanding public recreational use of such waters[4] and private developments of the adjoining uplands.

Attorneys for private parties and members of the Commission's staff and this office who have intensively researched this question agree that there has been no reported California appellate court decision in a case where the State was a party and the boundary issue was squarely presented and determined. Resolution of this question is vital for certainty of both public and private land titles. Such a resolution can be obtained only through judicial proceedings.

The aforementioned pending litigation is an appropriate means for the State to obtain the necessary determination of what line constitutes the boundary. Such cases also afford an opportunity for the courts to clarify public rights in inland navigable waters regardless of whether the boundary

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[4]See, *e.g.*, *People ex rel. Baker v. Mack*, 19 Cal.App.3d 1040, 1045 (1971):

> ". . . With our ever-increasing population, its ever-increasing leisure time (witness the four and five day week), and the ever-increasing need for recreational areas (witness the hundreds of camper vehicles carrying people to areas where boating, fishing, swimming and other water sports are available), it is extremely important that the public not be denied use of recreational waters. . . ."

is the ordinary high-water mark or the ordinary low-water mark.

In light of our conclusion that a serious question exists as to which line is the boundary, the Commission has recently reaffirmed its authorization that this office continue to take the following position in litigation:

1. In general, the State of California's sovereign ownership of the lands underlying navigable lakes and nontidal, navigable rivers extends landward to the ordinary high-water mark.

2. Irrespective of whether the State's title to such lands extends landward to that line or merely to the ordinary low-water mark, the strip of lands between the two lines is subject to the common-law public trust for commerce, navigation and fisheries.

3. Independently of the common-law public trust, members of the public have the right to use inland navigable waters lying waterward of the ordinary high-water mark if such waters are capable of being navigated by small boats for fishing and other recreational purposes regardless of the ownership of the underlying lands.

We are aware that the State's current position with respect to inland navigable water boundaries is inconsistent with that taken by this office and the Commission before 1970. We also acknowledge that statements, or assumptions, in our prior opinions may have contributed to the uncertainty as to this complex subject.[5]

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[5]See, *e.g.*, 43 Ops. Cal. Atty. Gen. 291, 292, 295, 296 (1964); 30 Ops. Cal. Atty. Gen. 262, 269 (1957) (Lake Tahoe); 23 Ops. Cal. Atty. Gen. 306, 307, 309 (1954) (Lake Tahoe); 23 Ops. Cal. Atty. Gen. 97, 98 (1954) (Lake Tahoe); and Ops. Cal. Atty. Gen. No. 3100, pp. 5-6 (1916) (Clear Lake).

In view of this situation, we recommend the following course of action:

1. Pending a definitive appellate court resolution of the water boundary question, the Commission (a) should refrain from requesting private parties to enter into new leases for existing improvements landward of the ordinary low-water mark, and (b) should excuse any payments otherwise due under present leases of lands between the ordinary high-water and ordinary low-water marks of inland navigable waters.

2. Notice should be given to presently or potentially affected private upland owners and members of the general public with respect to the State's position in pending litigation.

Although the State is generally asserting sovereign ownership of the beds of inland navigable waters landward to the ordinary high-water mark, the Commission must consider and evaluate all relevant factual circumstances with respect to any specific boundary problem before claiming title up to the ordinary high-water mark. The Commission and its staff must realize that various legal and equitable defenses potentially may be raised in opposition to such an assertion by the State in certain situations.

## ANALYSIS

A full discussion of all authorities supporting the position being asserted by this office in pending lake and river cases on behalf of the Commission is beyond the scope of this letter. The following briefly summarizes the rationale for our assertions.

1. *State Ownership Between 1850 and 1871*

In 1850, upon its admission to the Union, the State of California obtained sovereign title to all lands underlying inland navigable waters within its boundaries, except for such lands included within prior Spanish and Mexican rancho grants. See Act of Admission of the State of California, 9 U.S. Stat. 452 (1850); *Oregon v. Corvallis Sand & Gravel Co.*, 97 S.Ct. 582, 586-89 (Jan. 12, 1977); *Knight v. U.S. Land Association*, 142 U.S. 161, 183-84 (1891); and *Hardin v. Jordan*, 140 U.S. 371, 382 (1891).

The California Legislature, in anticipation of Statehood, adopted the common law as the "rule of decision." Stats. 1850, ch. 95, p. 219. The California Supreme Court, in interpreting this statute, held that the reasoning of American courts *"down to the present time"* should be considered, rejecting the argument that the new State was required to follow the English "common law *as it was administered prior* to July 4, 1776." *Lux v. Haggin*, 69 Cal. 255, 379-86 (1886). (Emphasis by court.)

In general, under the common law as applied in the United States, the initial landward extent of the sovereign states' title to the beds of inland navigable waters is the ordinary high-water mark. Many states discarded the English common-law rule that only the beds of *tidal* rivers are owned by the Crown, and treated their *nontidal*, navigable waters in the same manner as tidal rivers for title purposes. See, *e.g., Oregon v. Corvallis Sand & Gravel Co., supra*, 97 S.Ct. 582, 591, and *Hardin v. Jordan, supra*, 140 U.S. 371, 382-84.

As of 1850, the ordinary high-water mark delimited the boundary between the State of California's sovereign lands underlying inland navigable waters and the adjoining federal public domain lands. See *Barney v. Keokuk*, 94 U.S. 324, 336, 338 (1877). Absent a "declaration" by a state, federal public land grants of such uplands to private parties do not extend waterward of the ordinary high-water mark. See *Hardin v. Shedd*, 190 U.S. 508, 519 (1903). Since our research has disclosed no California statute or appellate court decision between 1850 and 1871 stating, or even suggesting, that a line other than the ordinary high-water mark constitutes the boundary of the State's fee title to the beds of inland navigable waters, it is our opinion that the State had made no such "declaration" before 1872.

2. *Enactment of Statutes in 1872*

In 1872, the Legislature adopted a statutory scheme with respect to the State's ownership of lands underlying navigable waters and the rules for interpreting ambiguous descriptions in conveyances of property bounded by such waters. These statutes, which became effective on January 1, 1873, were amended during the 1873-74 legislative session. Civil Code section 670, as thus amended, states:

> "The State is the owner of all land . . . below the water of a navigable lake or stream; . . ."

Section 830 of the Civil Code, as thus amended, provides:

> "Except where the grant under which the land is held indicates a different intent, . . . when it borders upon a navigable lake or stream, where there is no tide, the owner [of the upland] takes to the edge of the lake or stream, at low-water mark; . . ."

Code of Civil Procedure section 2077, as amended, contains rules for construing ambiguous descriptions in conveyances of real property, and states that ". . . [w]hen a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low-water mark are included in the conveyance."

Clearly, Civil Code section 670 sets forth rules of property and Code of Civil Procedure section 2077 contains rules of construction of ambiguous descriptions in property conveyances, and neither statute constitutes a present or future mass grant of the strip of sovereign lands beneath California's inland navigable waters between the ordinary high-water and ordinary low-water marks. On the other hand, Civil Code section 830, which relates to boundaries, arguably might be deemed to enunciate either a rule of property or a rule of construction.

For several decades before 1970, this office, the Commission and other officials appear to have *assumed* that section 830[6] states a rule of property. See, *e.g.*, 43 Ops. Cal. Atty Gen. 291 and other opinions cited in footnote 5, *supra*. The State's thorough reexamination of the effect to be given section 830 began with two consolidated eminent domain actions involving the Feather River, and has continued to date in connection with the other previously mentioned lake and river litigation and the Commission staff's preparation of maps depicting State claim lines with respect to legislatively mandated Area Project Studies.

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[6]All section references hereinafter are to the Civil Code unless otherwise specified.

On November 6, 1970, the State asserted that the ordinary high-water mark, as opposed to the ordinary low-water mark, constitutes the subject boundary in a memorandum of points and authorities filed during the retrial of the Feather River condemnation actions, *The People of the State of California v. Shasta Pipe and Supply Co., supra,* Butte Co. Sup. Ct. No. 37390, and its companion case. On March 24, 1971, the trial court held that, with respect to a navigable, nontidal stretch of that river, the ordinary high-water mark is the boundary. The court expressly rejected the contrary view stated in this office's 1964 opinion. The retrial was held in accordance with the instructions of the Court of Appeal in *People ex rel. Dept. Pub. Wks. v. Shasta Pipe etc. Co., supra,* 264 Cal. App. 2d 520, 531-36. The judgment upon retrial was not appealed.

Since the *Shasta Pipe* decision upon retrial, three title insurance company spokesmen have publicly speculated about the impact of that decision and the effect to be given section 830.[7] Meanwhile, the State has consistently asserted its sovereign title landward to the ordinary high-water mark in a number of other lawsuits. For example, our position was articulated in a document filed October 29, 1975, in a case involving Lake Tahoe, *HKM Investments v. City of South Lake Tahoe, et al., supra,* El Dorado Co. Sup. Ct. No. 24285. While asserting the high-water bound-

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[7]See Leerskov, *Meander Lines,* "Title Tips," The California Surveyor, No. 43, p. 18 (Fall 1976); text of speech by R. H. Morton, president, Western Title Insurance Company, to the annual convention of the California Land Title Association, San Diego, May 7, 1976; McKnight, *Title to Lands in the Coastal Zone: Their Complexities and Impact on Real Estate Transactions,* 47 Cal. St. B.J. 408, 464-75 (1972).

ary in such litigation, this office and the Commission's staff continued the State's meticulous reexamination of the water boundary question, particularly during the past two to three years. Our research and analysis included an intensive review of voluminous materials furnished to us by title industry spokesmen and attorneys representing private littoral and riparian owners.

As discussed more fully below, our conclusion, following this lengthy and exhaustive reexamination, is that section 830 does not set forth a rule of property, and that, in general, the State is the sovereign owner of lands beneath inland navigable waters landward to the ordinary high-water mark. Although we recognize that this position is inconsistent with statements, or assumptions, in our 1964 opinion and earlier opinions,[8] and that others have different views on the subject, we believe that it is indisputable that the current uncertainty in the law should be resolved promptly to clarify the respective rights, title and interests of both the public and the private littoral and riparian property owners.

3. *Bases for State's High-Water Boundary Claim*

The premise underlying the State's current position is that the enactment of section 830 in 1872 and its amend-

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[8]It is noteworthy that the Attorney General of the State of Nevada recently disapproved two of his earlier written opinions on the boundaries of inland navigable waters. In Nevada Attorney General Opinion No. 204 issued April 20, 1976, it was stated: "It is the present opinion of this office that the title to lands beneath navigable waters in Nevada is bounded by the ordinary and permanent high-water mark and prior opinions to the contrary are hereby superseded."

ment during the 1873-74 legislative session did not constitute either a present or future general conveyance to the federal government or to private parties of the strip of sovereign lands beneath inland navigable waters between the ordinary high-water and ordinary low-water marks.

It is this office's opinion, based upon our reexamination of the water boundary issue, that although there is a serious question as to the effect to be given section 830, the State has sound legal bases for asserting a claim of ownership landward to the ordinary high-water mark.

Section 830 contains no express language granting such lands, thus differing sharply from statutes authorizing the alienation of sovereign tidelands or State-owned proprietary lands. Unlike such statutes as the contemporaneously enacted sections 3440 to 3493½ of the Political Code, relating to the management and sale of State lands by the Surveyor General, section 830 does not provide for the payment of any compensation to the State by private parties or for the issuance of a patent describing the lands.

Indeed, section 830 has been treated as stating a rule of construction rather than a rule of property in a number of cases. See, *e.g., Freeman v. Bellegarde,* 108 Cal. 179, 185 (1895); *Hess v. Merrell,* 78 Cal.App.2d 896, 899-900 (1947); *Lynch v. Kupfer,* 134 Cal. App. 652, 656 (1933); and *Drake v. Russian River Land Co.,* 10 Cal. App. 654, 660-61 (1909).

Our assertion that the ordinary high-water mark constitutes the subject boundary is strongly supported by language in the California Supreme Court's opinion in *Churchill Co. v. Kingsbury,* 178 Cal. 554 (1918). The decision expressly states that Little Klamath Lake, a navigable lake,

"consists of the body of water contained within the banks as they exist as the stage of ordinary *high* water. . . ." *Id.* at 558. (Emphasis added.) Although section 830 was not cited, the court presumably was cognizant of the provisions thereof. *Cf. Bishop v. City of San Jose,* 1 Cal. 3d 56, 65 (1969) (in interpreting statutes, it is presumed that the Legislature was aware of existing judicial decisions). Moreover, when an issue has been litigated and determined, "all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto." *Price v. Sixth District Agricultural Assn.,* 201 Cal. 502, 511 (1927). The relevant language in the *Churchill* decision has been overruled, qualified or even questioned by the Supreme Court.[9]

In this office's 1964 opinion, the *Churchill* language is discounted as authority for the high-water rule. See 43 Ops. Cal. Atty. Gen. 291, 295. That opinion relates to "the criteria to be used for locating [the ordinary] low water mark on non-tidal navigable streams, the beds of which are owned by the State of California in its sovereign capacity." *Id.* at 291. Although the specific questions asked in the opinion requested by the then Executive Officer of the Commission merely *assumed* that private ownership of uplands adjoin-

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[9]The State Surveyor General, predecessor of the State Lands Commission, was a party defendant to the *Churchill* case and in subsequent related litigation. See *Franklin v. Churchill Co.,* 187 Cal. 555, 556 (1921); *Reynolds v. Churchill Co.,* 187 Cal. 543, 545-46, 548-52 (1921); *Franklin v. Churchill Co.,* 73 Cal. App. 304, 307-09 (1925); and *Montgomery v. Neilon,* 41 Cal. App. 184, 188, 191 (1919). See also 7 Ops. Cal. Atty. Gen. 182 (1946) and Op. No. NS4490 (1942).

ing inland navigable waters extends waterward to the ordinary low-water mark, it must be conceded that the opinion does not question the propriety of using that line instead of the ordinary high-water mark. *Id.* at 292-95.

Upon reanalysis of *Churchill Co. v. Kingsbury, supra,* 178 Cal. 554, we have concluded that the Supreme Court's language to the effect that the State's ownership of the subject lake bed extends landward to the ordinary high-water mark was vital to that decision, and is not dictum. The pivotal issue was whether petitioner had any right to a patent to certain lands. *Id.* at 555-56. In dismissing petitioner's proceeding in mandamus, the court unqualifiedly stated:

> ". . . It [petitioner] does, however, take the stand that *the land is, in fact, sovereign land of the state, and in this,* we think, it is clearly right." *Id.* at 558. (Emphasis added).

The court stated that "[t]he lands [in dispute] are still covered by the waters of the lake during the greater part of each year." *Id.* at 560. Clearly, the court reasoned that the disputed lands were still waterward of the ordinary high-water mark and hence sovereign lands.

Additional decisions stating, or clearly implying, that the ordinary high-water mark constitutes the boundary include *Heckman v. Swett,* 99 Cal. 303, 307-08, 309-10 (1893), *aff'd,* 107 Cal. 276, 280 (1895) (Eel River; dictum as to non-tidal watercourses); *Packer v. Bird,* 71 Cal. 134, 135 (1886), *aff'd,* 137 U.S. 661, 673 (1891) (nontidal, navigable portion of Sacramento River); and *People v. Morrill,* 26 Cal. 336, 356 (1864) (tidelands; dictum as to nontidal watercourses).

Some secondary authorities also indicate that the ordinary high-water mark is the boundary. See, *e.g.*, 4 American and English Encyclopedia of Law 824-25 (2d ed. 1897), and 2 Nichols, The Law of Eminent Domain, § 5.791[1], p. 5-314 n.12 and accompanying text (rev. 3d ed. 1976).

On the other hand, several Court of Appeal decisions suggest, or assume, that the subject boundary is the ordinary low-water mark. This office's 1964 opinion cites *Crews v. Johnson*, 202 Cal. App. 2d 256, 258 (1962) (Clear Lake), and *City of Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 467 (1935) (Mono Lake), as authority for this proposition. A careful re-examination of these cases demonstrates that they did not squarely adjudicate the water boundary question.

In *Crews*, the two private parties agreed that private ownership extends to the ordinary low-water mark, and the question of whether that line or the ordinary high-water mark is the landward boundary of the publicly owned bed of Clear Lake was not at issue.

In *Aitken*, the Court of Appeal merely assumed that section 830 is a rule of property and stated that the only issue presented on appeal was whether a municipal condemnor had to pay substantial damages for affecting littoral rights of adjacent private land owners to have the natural level of a navigable lake maintained.

Since this office's 1964 opinion, the federal courts have handed down decisions containing dicta suggesting that the ordinary low-water mark is the landward boundary. See *United States v. Gossett* and *United States v. Williams*,

277 F. Supp. 11, 13 (C.D. Cal. 1967), *aff'd*, 416 F. 2d 565, 569 (9th Cir. 1969), *cert. denied*, 397 U.S. 961 (1970). However, the Ninth Circuit Court of Appeals' decision must be strictly limited to the specific factual and legal situations involved. Significantly, the State of California disclaimed any interest in the lands in dispute. Moreover, a federal court's construction of a State statute is not binding on California courts. See *City of Oakland v. Buteau*, 180 Cal. 83, 89 (1919), and *Strand Improvement Co. v. Long Beach*, 173 Cal. 765, 772-73 (1916).

Three additional grounds supporting our present position should be mentioned briefly.

First, various principles of statutory construction buttress our conclusion that section 830 merely states a rule for interpreting ambiguous descriptions in conveyances. It is a fundamental precept that laws in derogation of sovereignty are construed strictly in favor of the State and are not permitted to divest it or its government of any prerogatives, unless intention to effect that object is clearly expressed. *People v. Centr-O-Mart*, 34 Cal. 2d 702, 703 (1950). See also *People v. California Fish Co.*, 166 Cal. 576, 592-93 (1913), and *Eden Memorial Park Assn. v. Superior Court*, 189 Cal. App. 2d 421, 423-24 (1961). Moreover, grants from the State are to be strictly construed in its favor. Civ. Code § 1069; *Los Angeles v. San Pedro etc. R.R. Co.*, 182 Cal. 652, 655 (1920); and *White v. State of California*, 21 Cal. App. 3d 738, 766-67 (1971).

Secondly, if the enactment of section 830 had been intended as a present grant, or to empower some unnamed public officials to make a future conveyance of the strip of

sovereign lands between the ordinary high-water and ordinary low-water marks along all inland navigable waters,[10] it is possible the courts would invalidate the statute on the ground that such an act was beyond the power of the Legislature. See *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 460 (1892); *cf. Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 183 (1897).

Third, California's well-settled public policy favoring public access to and use of navigable waters furnishes a firm foundation for our position. Such policy considerations are reflected in numerous constitutional and statutory provisions and in various appellate court decisions, including the following: Act of Admission of California, 9 U.S. Stat. 452 (1850); former Article XV, section 2 of the 1879 California Constitution (renumbered Article X, section 4); Article I, section 25 of the 1879 California Constitution; Gov. Code § 66900 *et seq.* and § 67000 *et seq.*, relating to the protection and preservation of Lake Tahoe; *Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 42-43 (1970); *Lux v. Haggin, supra*, 69 Cal. 255, 321; *Hitchings v. Del Rio Woods Recreation & Park Dist.*, 55 Cal. App. 3d 560, 566-71 (1976). See also 55 Ops. Cal. Atty. Gen. 293, 294, 296-99 (1972).

4. *Common-Law Public Trust*

Even if the courts determine that section 830 operated to convey fee title to the strip of lands underlying inland

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[10]A summary of California shortline mileages prepared in May 1972 by the Commission's staff indicates there were then 807 miles of shoreline around navigable lakes and 3,046 miles of shoreline along nontidal, navigable rivers in the State.

navigable waters between the ordinary high-water and ordinary low-water marks, another significant issue in the State's pending lake and river litigation is whether that strip is impressed with the common-law public trust for commerce, navigation and fisheries. Our 1964 opinion and earlier opinions did not address this subject.

The landmark United States Supreme Court case articulating the common-law public trust doctrine involves the Chicago waterfront in Lake Michigan. *Illinois Central Railroad v. Illinois, supra,* 146 U.S. 387, 452. California appellate courts, relying upon *Illinois Central,* have consistently held that tidelands are subject to the common-law public trust. See, *e.g., Marks v. Whitney, supra,* 6 Cal. 3d 251, 259-60, and *People v. California Fish Co. supra,* 166 Cal. 576, 597. Since the State obtained title to previously ungranted beds of inland navigable waters upon admission to the Union in the same manner as it became the owner of previously ungranted tidelands, we believe that it is clear that the public trust doctrine is equally applicable to the lands underlying such nontidal but navigable waters.

Moreover, it is our opinion that the enactment of section 830 could not have operated to terminate the common-law public trust in inland navigable waters because that statute does not "clearly express or necessarily imply" a legislative intent to lift the trust. *Cf. People v. California Fish Co., supra,* 166 Cal. 576, 585, 597; *County of Orange v. Heim,* 30 Cal. App. 3d 694, 719-20, 722-23 (1973).

5. *Bohn/Mack Recreational Easement*

In addition to asserting that inland navigable waters are impressed with the common-law public trust, this

office is taking the position in pending litigation that, irrespective of title, there is a recreational easement enabling members of the public to use such waters lying waterward of the ordinary high-water mark for fishing and other recreational purposes under the *Bohn/Mack* rule.

This judicially created doctrine, which is distinct from the common-law public trust, was set forth in *Bohn v. Albertson,* 107 Cal. App. 2d 738, 749 (1951). Later, the rule was amplified in *People ex rel. Baker v. Mack, supra,* 19 Cal. App. 3d 1040, 1046, in which it was held that the public can use any stream capable of being used for recreational purposes. The court stated that ". . . members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner *at any point below high water mark* on waters of this state which are capable of being navigated by oar or motor-propelled small craft." *Id.* at 1050. (Emphasis added.) See also *Hitchings v. Del Rio Woods Recreation & Park Dist., supra,* 55 Cal. App. 3d 560, 566-71.

Although *Mack* involved the Fall River, its rationale is equally applicable to navigable lakes; the court cited with approval and relied upon cases from other jurisdictions relating to lakes. *People ex rel. Baker v. Mack, supra,* 19 Cal. App. 3d 1040, 1046-47.

6. *Authority of the State Lands Commission*

We believe that, in light of the legal situation discusssed above, the State Lands Commission, which has "exclusive jurisdiction . . . of the beds of navigable rivers, streams, [and] lakes, . . ." (Pub. Resources Code § 6301), and is the trustee of the common-law public trust in such lands,

has the authority to assert California's sovereign ownership of such lands landward to the ordinary high-water mark in pending or potential litigation relating to the subject boundary question.

The Commission also is authorized to take whatever legal action as may be necessary to "eject from any . . . beds of navigable channels, streams, rivers, creeks, [and] lakes, . . . under its jurisdiction, any person, firm or corporation, trespassing upon any such lands, through appropriate action in the courts of this State." Pub. Resources Code § 6302. See also Pub. Resources Code §§ 6216(a), 6307, 6327, 6461, 6462, 6501 *et seq.*, 7601 *et seq.*, 7992; *cf.* Pub. Resources Code §§ 6210.4, 6225, 6371 *et seq.*

## CONCLUSION

We share the State Lands Commission's concern that an appellate court determination of the effect to be given Civil Code section 830 be obtained at the earliest possible time so that there may be certainty as to the respective rights, title and interests of the State and private upland owners in and to California's valuable inland navigable waters.

Very truly yours,

/s/ EVELLE J. YOUNGER
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Attorney General

# Opposition

Office-Supreme Court, U.S.
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CLERK

IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1980

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*Respondents.*

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*Respondents.*

On Petitions for a Writ of Certiorari to the Supreme Court of the State of California

# RESPONDENTS' BRIEF IN OPPOSITION

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# TABLE OF CONTENTS


*Page*

Opinions below ..... 2

Jurisdiction ..... 2

Constitutional provisions and statutes involved ..... 2

Questions presented ..... 3

Statement of the case ..... 4

Summary of argument ..... 5

Reasons why the writ should be denied

1. The extent and nature of the rights of littoral property owners holding between high and low water on navigable water is determined by state property law. No federal question is presented..... 6

2. This court lacks jurisdiction for want of an adequate federal question ..... 13

   a. Petitioners have failed to allege any denial of economic use of their property ..... 13

   b. No "rule of property" is being changed or reversed in this case. The California court's declaration of the ancient public trust doctrine did not constitute a taking; nor did it violate the constitutional rights of petitioners ..... 16

3. The state court decisions at issue here did not construe this court's holding in Illinois Central as a "binding principle of federal constitutional law." Even if such a construction were made, however, the holdings can be sustained on independent state grounds..... 19

4. A waterward boundary is, by common law, a moveable one. It is affected by accretion and reliction, whatever their cause. The court below, in adopting the common law rule, has recognized physical realities and the reasonable expectations of landowners..... 22

5. The issue of ertoppel was properly decided ..... 24

Conclusion ..... 26

# TABLE OF AUTHORITIES

**Cases**


| | Page |
|---|---|
| *Agins v. City of Tiburon* (1980) 447 U.S. 255 | 6, 16 |
| *Anderson v. Ray* (1916) 37 N.D. 17, 156 N.W. 591 | 11 |
| *Appleby v. New York* (1926) 271 U.S. 364 | 20 |
| *Arnold v. Mundy* (1821) 6 N.J.L. 1 | 9, 20, 27 |
| *Attorney General v. Revere Copper* (1890) 152 Mass. 444, 25 N.E. 605 | 12 |
| *Barney v. Keokuk* (1876) 94 U.S. 324 | 8, 10, 11, 26 |
| *Boone v. Kingsbury* (1928) 206 Cal. 148, 273 P. 797, appeal dismissed and cert. denied, 280 U.S. 517 (1929) | 5, 15 |
| *Bowman's Devisees v. Wathen* (1842) 2 McLean 382 | 8 |
| *Carpenter v. City of Santa Monica* (1944) 63 Cal.App.2d 772, 147 P.2d 964 | 23 |
| *Chowchilla Farms, Inc. v. Martin* (1933) 219 Cal. 1, 25 P.2d 435 | 23, 24 |
| *Churchill Co. v. Kingsbury* (1918) 178 Cal. 554, 174 P. 329 | 18 |
| *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, Cert. denied 66 L.Ed. 2d 48, ___U.S. ___(1980) | 6, 13, 17, 28 |
| *City of Los Angeles v. Aitken* (1935) 10 Cal. 460, 52 P. 585 | 23 |
| *City of Oakland v. Bouteau* (1919) 180 Cal. 83, 179 P. 170 | 22 |
| *City of Oakland v. Oakland Water Front Company* (1897) 118 Cal. 160, 50 P. 277 | 7, 9, 21 |
| *Colberg v. State of California* (1967) 67 Cal.2d 408, 62 Cal.Rptr. 401, 432 P.2d 3, cert. denied 390 U.S. 949 (1968) | 10, 13 |
| *County of St. Clair v. Lovingston* (1874) 90 U.S. (23 Wall) 46 | 22 |
| *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64 | 19 |
| *Flissrand v. Madison* (1915) 35 S.D. 451, 152 N.W. 795 | 11 |
| *Forestier v. Johnson* (1912) 164 Cal. 24, 127 P. 156 | 8, 9 |
| *Genessee Chief v. Fitzhugh* (1851) 53 U.S. (12 How) 443 | 11 |
| *Gibson v. Kelly* (1895) 15 Montana 417, 39 P. 517 | 12 |
| *Hardin v. Jordan* (1891) 140 U.S. 371 | 18 |
| *Herb v. Pitcairn* (1945) 324 U.S. 117 | 21 |
| *Hillebrand v. Knapp* (1937) 65 S.D. 414, 274 N.W. 821 | 11 |
| *Hitchings v. Del Rio Woods Recreation & Park Dist.* (1976) 55 Cal.App.3d 560, 127 Cal.Rptr. 830 | 11 |
| *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387 | 4, 6, 14, 18, 20, 21 |
| *Illinois Steel Co. v. Bilot* (1901) 109 Wis. 418, 85 N.W. 402 | 12 |
| *Los Angeles Athletic Club v. City of Los Angeles* (1932) 128 Cal.App. 427, 17 P. 2d 1061 | 15 |
| *Martin v. Smith* (1960) 184 Cal.App.2d 571, 7 Cal.Rptr. 725 | 5, 15 |
| *Martin v. Waddell* (1842) 41 U.S. (16 Pet) 367 | 8, 9, 20, 27 |
| *Miller v. Lutheran Conference and Camp Association* (1938) 331 Pa. 241, 200 A. 646 | 12 |

Page

*Natural Soda Products Co. v. City of Los Angeles* (1943) 23 Cal.2d 193, 143 P.2d 12, cert. denied 321 U.S. 793 (1944) ..... 23, 24
*Nedtweg v. Wallace* (1926) 237 Mich. 14, 208 N.W. 51, aff'd on rehearing 211 N.W. 647 (1927) ..... 12
*Oregon ex rel State Land Board v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363 ..... 9, 16, 17, 19, 23, 26
*Packer v. Bird* (1886) 71 Cal. 134, 11 P. 873, aff'd. 137 U.S. 661 (1891) ..... 10, 18
*People v. California Fish Co.* (1913) 166 Cal. 576, 139 P. 79 ..... 8, 9, 14, 15, 20, 21, 22
*People v. Gold Run D & M Co.* (1884) 66 Cal. 138, 4 P. 1152 ..... 10, 20
*People ex rel Pierce v. Morrill* (1864) 26 Cal. 336 ..... 27
*Pollard's Lessee v. Hagan* (1845) 44 U.S. (3 How) 212 ..... 8
*Santa Fe Land Improvement Company v. City of Berkeley* (Oct. 6, 1980) cert. denied 66 L.Ed.2d 48, ___ U.S. ___ ..... 3, 5, 17
*Shively v. Bowlby* (1893) 152 U.S. 1 ..... 8, 18
*Sloan v. Biemiller* (1878) 34 Ohio St. 492 ..... 11
*State v. Cleveland & Pittsburgh Railroad Co.* (1916) 94 Ohio St. 61, 113 N.E. 677 ..... 12
*State v. Parker* (1917) 132 Ark. 316, 200 S.W. 1014 ..... 23
*State v. Sorenson* (1937) 222 Ia. 1248, 271 N.W. 234 ..... 23
*State v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240, 625 P.2d 256, 172 Cal. Rptr. 713 ..... 16, 17, 22, 27
*State v. Superior Court (Lyon)* (1981) 29 Cal.3d 210, 172 Cal.Rptr. 696, 625 P.2d 239 ..... 4, 5, 11, 16, 17, 18, 24, 25, 27, 28
*Swift v. Tyson* (1842) 41 U.S. (16 Pet) 1 ..... 20
*Taylor v. Underhill* (1871) 40 Cal. 471 ..... 8, 21
*U.S. v. California* (1947) 332 U.S. 19 ..... 16, 26
*U.S. v. Oregon* (1935) 295 U.S. 1 ..... 20
*U.S. v. Rands* (1967) 389 U.S. 121 ..... 13, 14
*U.S. v. Willow River Co.* (1944) 324 U.S. 499 ..... 13
*Village of Pewaukee v. Savoy* (Wis. 1899) 79 N.W. 436 ..... 23
*Ward v. Mulford* (1867) 32 Cal. 365 ..... 7, 8
*Wilbour v. Gallagher* (1969), 77 Wn. 306, 462 P.2d 232, cert. denied 450 U.S. 878 (1970) ..... 23
*Zabel v. Tabb* (5th Cir. 1970) 430 F.2d 199 ..... 13

**Miscellaneous**

Althaus, Public Trust Rights (U.S. Dept. of Interior, 1978) ..... 8, 9
31 A.L.R. 960 (1924) ..... 19
California Constitution, Article X, Section 4 ..... 2
California Rule of Court No. 977 ..... 19
1 Clark, Waters and Water Rights ..... 9
Dunning, The Significance of California's Public Trust Easement for California Water Rights Law, 14 U.C. Davis L. Rev. 357 (1980) 8, 28

*Page*

Gould, Treatise on the Law of Waters (3d ed. 1900) ..... 18
Memorandum, Attorney General to San Francisco Bay Conservation & Development Commission, San Francisco Bay Plan Supplement (Jan. 1969) ..... 15, 16
Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L.Rev. 471 (1970) ..... 8, 9, 21, 28
Solicitor's Opinion, Department of Interior, 25 L.D. 510 (1897) ..... 8
Survey—Owens Lake, 46 Public Lands Decisions 68 (March 23, 1917) ..... 18
28 U.S.C. § 1257 ..... 2, 3, 6, 21
Waters, 52 Cal.Jur.2d (1959) ..... 19

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## RESPONDENTS' BRIEF IN OPPOSITION

Respondents State of California, State Lands Commission of the State of California and Department of Fish and Game of the State of California, hereby submit their

joint brief in opposition to the petitions for a writ of certiorari, which seek review of the decisions of the California Supreme Court.

## OPINIONS BELOW

The opinions of the California Supreme Court are reported at 29 Cal.3d 210 (172 Cal.Rptr. 696, 625 P.2d 239) and 29 Cal.2d 240 (172 Cal.Rptr. 713, 625 P.2d 256).

## JURISDICTION

Petitioners seek to invoke this Court's jurisdiction under 28 United States Code section 1257(3). For the reasons set forth below, this Court lacks jurisdiction to consider the questions raised in the petition.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the Fourteenth Amendment to the United States Constitution and the state statutes referred to by petitioners, this case also involves article X, section 4 (formerly article XV, section 2) of the California Constitution. Article X, section 4, provides as follows:

> "No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

And, for purposes of the jurisdictional questions, consideration of 28 United States Code section 1257(3), is required:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> " . . . . . .
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

## QUESTIONS PRESENTED

Respondents differ with petitioners' characterization of the questions before this Court. Actually, the questions in this case are similar to those presented last year, by counsel for one of the same petitioners, in *Santa Fe Land Improvement Company* v. *City of Berkeley* (October 6, 1980) cert. denied 66 L.Ed.2d 48, ____ U.S. ____:

1. As a matter of state law, does a legislative transfer of sovereign lands, by its terms silent as to its effect on the public trust, operate to extinguish that trust, or do the lands pass subject to the trust?

2. Where a state supreme court has confirmed that grants by the state to private parties of lands beneath navigable waters remain subject to retained rights under the public trust for commerce, navigation and fish-

ery, has there been a taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

3. Where a state has granted sovereign lands to private parties, does this Court's decision in *Illinois Central Railroad* v. *Illinois* (1892) 146 U.S. 387, as a matter of federal constitutional law, govern the nature of the title conferred upon the private parties?

4. Where petitioners have failed to make any proposals for uses in areas subject to the state public trust easement and issues respecting the location of high and low water lines remain to be tried on remand to the state trial court, should this Court render an advisory opinion concerning the permissibility of such uses and lines?

## STATEMENT OF THE CASE

This case began as a controversy over the upland boundaries of the beds of navigable, nontidal lakes and rivers held by California by virtue of her sovereignty. California claimed a high water boundary; petitioners contended that the State's sovereign ownership went to low water. After protracted proceedings, the State's claim to sovereign ownership was rejected. Relying upon administrative construction of an ambiguous state statute enacted in 1872, the California Supreme Court held that the state's ownership went to low water as a matter of state law. *State* v. *Superior Court (Lyon)* (1981) 29 Cal.3d 210 (172 Cal.Rptr. 696, 625 P.2d 239); Lyon's Appendix A-1, at A-16–A-18. The Court further found, however, that the statute on which petitioners relied to establish their low water boundary showed no

intent on the part of the Legislature to abrogate the public trust with which all sovereign lands are impressed. Accordingly, pursuant to long-established California law, the fee ownership of the littoral owners on Lake Tahoe and other navigable, nontidal lakes and rivers between ordinary high and low water remains subject to the public trust for commerce, navigation and fisheries. Such owners may use their property consistently with the public trust (and such uses have been held to include mineral exploration (*Boone* v. *Kingsbury* (1928) 206 Cal. 148, 273 P.797, appeal dismissed and cert. denied. 280 U.S. 517 (1929)), and the construction of docks, wharves and similar improvements, motels, restaurants, shopping complexes and parking areas (*Martin* v. *Smith* (1960) 184 Cal.App.2d 571, 7 Cal. Rptr. 725)). The State may re-enter and exercise the trust for the purpose of navigational improvement or other trust purposes, but if it does, it must compensate the owner for any lawful improvements. *People* v. *California Fish Co.* (1913) 166 Cal. 576, 599, 139 P.79.

## SUMMARY OF ARGUMENT

The issues in this case are remarkably similar to those that this Court declined to hear last term in *Santa Fe Land Improvement Company* v. *City of Berkeley, supra,* cert. denied 66 L.Ed.2d 48, ____ U.S. ____.

There, as here, petitioners protested the application of California's long-standing rule that, absent an express indication of legislative intent, grants of sovereign land remain impressed with the public trust for commerce, navigation and fisheries. In that case as well as this one,

petitioners attempted to create a federal question by alleging that the California Supreme Court had felt itself bound to apply such a rule by *Illinois Central Railroad* v. *Illinois* (1892) 146 U.S. 387. And, in that case, as here, petitioners contended that the application of the public trust to their property had in effect deprived it of value in violation of the Fifth and Fourteenth Amendments.

In this case, as in *City of Berkeley,* petitioners have failed to present this Court with a substantial federal question meeting the requirements of 28 United States Code section 1257 (3). The *Illinois Central Railroad* decision was cited by the California court as a persuasive expression of common law and not as a binding rule of federal constitutional law. Even if it had been, however, there were independent state grounds for the decision below.

Nor have petitioners alleged facts which would constitute a taking in violation of the United States Constitution. In the first place, their property has been subject to the public trust since California's admission to the Union. The decision below, like the *City of Berkeley* opinion, was merely a restatement of California's long-standing rule of property to that effect. Secondly, petitioners under accepted state trust law, have a wide variety of uses available for their property. They have failed to make any proposals for development. No case or controversy has been presented to this Court. Petitioners are seeking an advisory opinion. *Agins* v. *City of Tiburon* (1980) 447 U.S. 255.

## REASONS WHY THE WRIT SHOULD BE DENIED

1. *The Extent and Nature of the Property Rights of Lit-*

*toral Property Owners Holding Between High and Low Water on Navigable Water Is Determined by State Property Law. No Federal Question Is Presented.*

The decision below is merely the last of a long series of California cases in which the courts have reaffirmed—as a matter of state common law—that sovereign lands between high and low water are held by the state in trust for the people for commerce, navigation, fisheries and related purposes, and that this trust easement remains attached to the land even if fee title has been conveyed to private persons, unless there is a clear legislative expression to the contrary and the conveyance promotes trust purposes.

The California courts have consistently recognized that the public trust does not terminate when the state passes title to lands underlying navigable waters. Early in this State's history the court noted in *Ward* v. *Mulford* (1867) 32 Cal. 365, that:

> "Such land is held by the State in trust and for the benefit of the people. The right is subservient to the public rights of navigation and fishery, and theoretically, at least, the State can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and whatever disposition she does make of them her grantee takes them upon the same terms which she holds them . . ."

Accord, *Taylor* v. *Underhill* (1871) 40 Cal. 471; *City of Oakland* v. *Oakland Water Front Company* (1897) 118 Cal. 160, 183, 50 P.277, 285:

> ". . . No grant of lands covered by navigable wa-

> ters can be made which will impair the power of a subsequent legislature to regulate the enjoyment of the public rights. The grantee takes the mere proprietary interest in the soil, and holds it subject to the public easement . . ."

See, also, *Forestier* v. *Johnson* (1912) 164 Cal. 24, 127 P. 156, and *People* v. *California Fish Co., supra,* 166 Cal. 576, 139 P.79. See, generally, Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich.L.Rev. 471, 524–531 (1970); Dunning, The Significance of California's Public Trust Easement for California Water Rights Law, 14 U.C. Davis L. Rev. 357, 363–366 (1980); Althaus, Public Trust Rights, 322–327 (U.S. Dept. of Interior, 1978).

The opinion of the court below thus represents a restatement of principles long-established as a matter of state property law. When California became a state, she acquired the beds of all her navigable waters as a matter of constitutional law by virtue of her sovereignty. *Oregon ex rel State Land Board* v. *Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363. The initial landward boundary of these sovereign lands is fixed by federal law. *Id,* 429 U.S. at 376. And that initial boundary, under federal law, is high water. *Barney* v. *Keokuk* (1876) 94 U.S. 324, 338; see Solicitor's Opinion, Department of Interior, 25 L.D. 510, 511 (1897); *Shively* v. *Bowlby,* 1893, 152 U.S. 1, 42–43; *Martin* v. *Waddell* (1842) 41 U.S. (16 Pet) 367; *Pollard's Lessee* v. *Hagan* (1845) 44 U.S. (3 How) 212; *Bowman's Devisees* v. *Wathen* (1842) 2 McLean 382.

Subsequently, of course, the extent of public and private rights in a state's navigable waters are to be determined by state law. *Barney* v. *Keokuk, supra,* 94 U.S. 324;

*Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co., supra*, 429 U.S. 363. The established law in California, as in many other states (see Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1970); 1 Clark, Waters and Water Rights, § 86.4(A), pp. 196–197; Althaus, Public Trust Rights, U.S. Dept. of Interior (Nov. 3, 1978)), is to the effect that, absent clear and express indications of legislative intent, the courts will not construe a grant of public trust lands as extinguishing the public easement for commerce, navigation and fisheries with which such lands are impressed. E.g., *People* v. *California Fish Co., supra*, 166 Cal. 576, 138 P.79; *Forestier* v. *Johnson, supra*, 164 Cal. 24, 127 P.156; *City of Oakland* v. *Oakland Water Front Co., supra*, 118 Cal. 160, 50 P.277.

This rule is not peculiar to California. It was enuciated by the New Jersey court as early as 1821 in *Arnold* v. *Mundy* (1821) 6 N.J.L. 1, and first recognized by this Court in *Martin* v. *Waddell, supra*, 41 U.S. (16 Pet.) 367, 409–13.

Its application to nontidal, as well as tidal, navigable waters in California is beyond question. As the California court held in 1884, with reference to the Sacramento and American Rivers:

"The State holds the absolute right to all navigable waters and the soils under them, subject, of course, to any rights in them which may have been surrendered to the general Government . . . The soil she holds as trustee of a public trust for the benefit of the people; and she may, by her Legislature, grant it to an individual; but

she cannot grant the rights of the people to the use of the navigable waters flowing over it; these are inalienable." *People* v. *Gold Run D & M Co.* (1884) 66 Cal. 138, 151–152, 4 P.1152, 1159.

As this Court stated in *Barney* v. *Keokuk:*

> "By the common law . . . such additions to the land on navigable waters belong to the crown, but as the only waters recognized in England as navigable were tide waters, the rule was often expressed as applicable to tide waters only; although the reason of the rule would equally apply to navigable waters above the flow of the tide; that reason being, that the public authorities ought to have entire control of its great passage ways of commerce and navigation to be exercised for the public advantage and convenience." 94 U.S. 324, 337–338 (1876) (holding plaintiffs' littoral title on Mississippi River subject to "public easement and use." *Id.*, at 339–340).

See, also, *Colberg* v. *State of California* (1967) 67 Cal. 2d 408, 423, 62 Cal. Rptr. 401, 432 P.2d 3, cert. denied 390 U.S. 949 (1968): "We are neither advised of, nor can we conceive of any reason why rules relating to one kind of navigable water, to wit tidewater, should not be applied with equal reason to similar situations involving other kinds of navigable waters," *Packer* v. *Bird* (1886) 71 Cal. 134, 11 P.873, aff'd. 137 U.S. 661 (1891).[1]

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[1] Contrary to the assertion of amici California Land Title Association and California Association of Realtors, the opinion below does not adopt an expanded definition of navigability and asserts no claim to waters which were not navigable for title purposes as a matter of federal law. The two lakes at issue in this proceeding—Clear Lake and Lake Tahoe—are undisputedly navigable for title—and thus, public trust purposes. In finding that California never adopted the purported English test of navigability—tidal influence—the Court expressly relied on this Court's definitions of navigability set forth in The Propeller *Genessee Chief* v. *Fitzhugh* (1851) 53 U.S. (12 How) 443 and *Barney* v. *Keokuk* (1876) 94 U.S. 324. Lyon's Appendix A-6–A-9. Later in its opinion

There is nothing unusual or unprecedented in a rule of state law that leaves public trusts rights impressed on grants to private parties. For example, South Dakota and North Dakota both have statutes similar to California's Civil Code section 830. In both states, these provisions were held, as in California, to give a fee interest to upland owners down to low water. Nevertheless, it was held that the statutes did not extinguish public trust rights:

> "While the title of the riparian owner on navigable or public waters extends to ordinary low water mark, still his title is not absolute, except to ordinary high water mark, and as to the intervening shore space between high and low water mark, the title of the riparian owner is qualified by and subject to the rights of the public." *Anderson* v. *Ray* (1916) 37 N.D. 17, 24, 156 N.W. 591, 595. Accord, *Flissrand* v. *Madison* (1915) 35 S.D. 451, 152 N.W. 795; *Hillebrand* v. *Knapp* (1937) 65 S.D. 414, 274 N.W. 821; *Sloan* v. *Biemiller* (1878) 34 Ohio St. 492; *State* v. *Cleveland & Pittsburgh Railroad Co.* (1916) 94 Ohio St. 61, 113 N.E. 677.

In Montana, which has a similar statute, the rule is the same:

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the Court discusses state holdings setting forth an expanded state definition of navigability for purposes of public rights of navigation only. These decisions themselves recognize the distinction between the definition of navigability for title purposes—governed by federal law, and state tests of navigability for boating and fishing. E.g., *Hitchings* v. *Del Rio Woods Recreation & Park Dist.* (1976) 55 Cal. App. 3d 560, 127 Cal. Rptr. 830. The Court's discussion was necessitated by petitioner's assertion that the existence of this state law easement precludes the existence of areas subject to the public trust between high and low water. Lyon's Appendix A-24–A-25. Actually these two doctrines, dependent on state and federal definitions of navigability respectively, are apples and oranges.

"It is true that, while the abutting owner owns to the low water mark on navigable rivers, still the public have certain rights of navigation and fishing upon the strip in question (between high and low water)." *Gibson* v. *Kelly* (1895) 15 Montana 417, 39 P. 517, 519. Other courts have also held that the trust attaches to lands between high and low water when the sovereign bed extends only to low water. See, e.g., *Nedtweg* v. *Wallace* (1926) 237 Mich. 14, 208 N.W. 51, aff'd. on rehearing, 211 N.W. 647 (1927); *Illinois Steel Co.* v. *Bilot* (1901) 109 Wis. 418, 85 N.W. 402; *Miller* v. *Lutheran Conference and Camp Association* (1938) 331 Pa. 241, 200 A. 646; *Attorney General* v. *Revere Copper* (1890) 152 Mass. 444, 25 N.E. 605.

The decision below does not constitute a new and startling departure from established state property law. Every time a California court considered this question, it was held that the public trust applied equally to nontidal as tidal waters. And for good cause, because there is no reason that the policy of the public trust should not apply equally to navigable nontidal portions of the Sacramento, American and San Joaquin Rivers—California's historic passageways of commerce to the Mother Lode and the Northern Mines. There is no reason why the same public trust protections should not apply to Lake Tahoe and Clear Lake as to Lake Superior and the great ponds of Massachusetts. No rule of stare decisis was violated by the California courts in holding the public trust remains attached to these waters to the ordinary high water mark because neither the Legislature nor the courts ever attempted to extinguish them.

2. *This Court Lacks Jurisdiction for Want of an Adequate Federal Question.*

   a. *Petitioners have failed to allege any denial of economic use of their property.*

Petitioners have urged that the existence of a public trust on privately held property between high and low water imposes invalid restrictions on their use of such property. Their complaint fails to assert a claim amounting to an unconstitutional taking.

The possible exercise of the public trust on navigable waters is no more a taking than is the proper exercise of the navigational servitude. It is ". . . not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject." *U.S.* v. *Rands* (1967) 389 U.S. 121, 123.

Setting public trust considerations aside, the interest of a littoral owner between high and low water is a qualified one to say the least. It is subject both to state and federal navigational servitudes to high water. See *City of Berkeley* v. *Superior Court* (1980) 26 Cal.3d 515, 545 (606 P.2d 362, 162 Cal. Rptr. 327, cert. denied 66 L.Ed.2d 48 ___ U.S. ___ (1980)); *Colberg* v. *State of California* (1967) 67 Cal.2d 408, 416, 62 Cal.Rptr. 401, 432 P.2d 3, cert. denied 390 U.S. 949 (1968); *U.S.* v. *Rands, supra,* 389 U.S. 121, 123; *U.S.* v. *Willow River Co.* (1944) 324 U.S. 499, 509. See also, *Zabel* v. *Tabb* (5th Cir. 1970) 430 F.2d 199.

The existence of a public trust on such lands does not deprive petitioners of economic use of the lands between high and low water. The California rule attached here falls far short of this Court's holding in *Illinois Central* that a legislative grant of trust lands to *revocable*. Here, purchasers have taken a fee subject to the retained public trust interest. The purchaser of lands subject to the public trust ". . . may use the property as he sees fit, subject to the power of the state to abate any nuisance he may create thereon, and to remove any purpresture he may erect thereon." Furthermore, where improvements have been constructed on such lands the state may not exercise the trust without compensating the patentee. *People* v. *California Fish Co.* (1913) 166 Cal. 576, 599, 139 P.79, 88.

With respect to the rights of the owners to fill or construct other improvements on lands subject to the public trust, this office has advised as follows:

> "The owner of lands subject to the public trust may use the property as he sees fit, subject to the power of the State to abate (prevent or remove) any nuisance or illegal obstruction he may create thereon, and to reoccupy the lands in the event such occupation becomes necessary for trust purposes. Such owner may be restrained from interfering with any existing navigational improvement or from filling such lands, if a properly authorized State agency determines that such filling will obstruct the free navigation of a bay, harbor, estuary or other navigable waterway. Whether or not a particular filling project by the private owner constitutes a nuisance or an illegal obstruction depends upon the navigability in fact of the waterway in question, or the effect of flow

therefrom upon other navigable waterways." Memorandum, Attorney General to San Francisco Bay Conservation and Development Commission, San Francisco Bay Plan Supplement 442 (January 1969).

Uses consistent with the public trust have been held, under prior decisions of this California courts, to include a veritable cornucopia of clearly economic and valuable ones, including mineral exploration (*Boone* v. *Kingsbury* (1928) 206 Cal. 148, 181–184, 273 P.797, 811–813) and the construction of docks, wharves, motels, restaurants, shopping complexes and parking areas (*Martin* v. *Smith* (1960) 184 Cal.App.2d 571, 7 Cal.Rptr. 725). True, the state may exercise the trust and re-enter for the purpose of furthering trust purposes, but if it does so it must compensate the owner for any lawful improvements. *People* v. *California Fish Co., supra,* 166 Cal. at 599, 138 P. at 98.

*Boone* v. *Kingsbury, supra,* 206 Cal. 148, 273 P.797, the case cited by petitioners for the proposition that mineral exploration and production belongs to the State as a public trust right, actually holds that such activities by the holder of the underlying bed (in that case, the State) are consistent with the public trust and therefore lawful under that doctrine. Similarly, petitioners' reliance on *Los Angeles Athletic Club* v. *City of Long Beach* (1932) 128 Cal.App. 427, 17 P.2d 1061, is misplaced. That case merely holds that the holder of the fee may construct playgrounds and parks on such lands, and that those uses are consistent with the public trust.

Petitioners cannot be heard to complain of being precluded from activities in which they have not even attempted to engage. They are entirely free to pursue

their reasonable investment expectations by submitting development plans to the appropriate officials. Indeed, the existence of the public trust, while possibly inhibitive of fill or the construction of incompatible improvements, does not, absent an impleme nting statute or ordinance, even require petitioners to btain the affirmative approval of anyone. *State* v. *Superior Court (Lyon)* (1981) 29 Cal.3d at 232; *State* v. *Superior Court (Fogerty)* (1981) 29 Cal.3d at 249. Cf. *Agins* v. *City of Tiburon* (1980) 447 U.S. 255, 262–263 (no taking where zoning ordinance valid on its face and landowners had not submitted a development plan to the City).

b. *No "rule of property" is being changed or reversed in this case. The California Court's declaration of the ancient public trust doctrine did not constitute a taking; nor did it violate the constitutional rights of petitioners.*

The *Lyon* and *Fogerty* decisions hold that California's public trust interest in navigable nontidal waters existed since her acquisition of such waters on statehood. *State* v. *Superior Court (Lyon)* (1981) 29 Cal.3d at 217–222. This proposition, so clearly a matter of state law under this Court's holdings (e.g., *Oregon* v *Corvallis San & Gravel Co.* (1977) 429 U.S. 363, at 375–381), precludes from the beginning any argument that the Court's decision amounted to a taking.

As the opinion below points out, the failure of the State to assert its trust rights in lands below high water can hardly be elevated to a "rule of property." *State* v. *Superior Court (Lyon)*, *supra*, 29 Cal.3d at 231. Cf. *U.S.* v. *California* (1947) 332 U.S. 19: "[O]fficers who have no

authority at all to dispose of government property cannot by their conduct cause the government to lose its valuable rights by their acquisience, laches, or failure to act."

It is therefore unnecessary to rely upon this Court's declaration that "In cases (dealing with state sovereign lands) considerations of *stare decisis* play a less important role than they do in cases involving substantive property law." *Oregon ex rel State Land Board* v. *Corvallis Sand & Gravel Co., supra,* 429 U.S. at 381.

The cases before this Court do not deal with grants, purportedly in fee, as did *Illinois Central, California Fish,* and *City of Berkeley.* Rather, the title claimed is based "only upon administrative interpretation of an ambiguous statute." *State* v. *Superior Court (Lyon), supra,* 29 Cal.3d at 232.

In the face of over a hundred years of decisions holding the public trust to be applicable to the beds of California's navigable waters, petitioners have been unable to find a single case holding to the contrary. Unlike *City of Berkeley* v. *Superior Court* (1980) 26 Cal.3d 515, cert. denied, sub. nom. *Santa Fe Land Improvement Co.* v. *City of Berkeley* (1980), ____U.S.____, 66 L.Ed. 48, this case does not involve the overruling of any previous decisions. In *City of Berkeley,* the California court had overruled an earlier decision expressly relating to tideland patents made under a series of statutes purporting to form a scheme for harbor improvements. There it was pointed out that there were "most cogent reasons" for overturning those decisions in light of the dominant doctrine of the public trust. Furthermore, the Court point-

ed out, "[w]e do not divest anyone of title to property; the consequences of our decison will be only that some landowners whose predecessors in interest acquired property under the 1870 act will, like the grantees in *California Fish*, hold it subject to the public trust." *Id.*, 26 Cal.3d at 533. Here, unlike *City of Berkeley*, no prior state decisions were reversed because there were no such decisions. On the contrary, the only decision of the California Supreme Court directly on point in which the State was a party held expressly that the shore of a nontidal navigable lake, between ordinary high and low water, is sovereign land of the state. *Churchill Co.* v. *Kingsbury* (1918) 178 Cal. 554, 558–559, 174 P. 329, 330–331. See, also, "Waters," 52 Cal.Jur.2d § 800, p. 448 (1959) citing *Churchill* for that identical proposition. The same result was reached in *Packer* v. *Bird* (1886) 71 Cal. 134, 135, 11 P. 873, aff'd. 137 U.S. 661 (1891), holding that the State's initial sovereign ownership of the bed of a nontidal but navigable portion of the Sacramento River extended to "the edge of the stream." 71 Cal. at 135. That holding was twice construed by this Court subsequently as an adoption of a "high water" boundary. *Hardin* v. *Jordan* (1891) 140 U.S. 371; *Shively* v. *Bowlby* (1893) 152 U.S. 1, 44–45. See, also, "Survey—Owens Lake." 46 Public Lands Decisions 68 (Mar. 23, 1917) (Secretary of Interior advises Surveyor General relative to Owens Lake, a navigable, nontidal water body in California, that State owns to high water); Gould, Treatise on the Law of Waters, § 76, p. 150 (3d ed. 1900) stating the "western rule" to be high water boundary on nontidal navigable waters).

Petitioners rely extensively on a dissent in the unpublished opinion of the intermediate state appellate court to support their contentions that no public trust exists between high and low water. Petition of Tahoe Shorezone Representation, pp. 7–8. Assuming, for the purpose of this brief, that such an opinion may be cited notwithstanding the prohibition of California's appellate rules of court (California Rule of Court No. 977), it should be noted that even the dissenting justice on which they rely confines his views to the question of fee title and, respecting public trust interests, states: "[t]he possible argument that the public trust doctrines include the right of the public to use the strip of land between high and low water during periods of low water has been rejected in New York and Wisconsin (See 31 A.L.R. 960 (1924)), but remains viable. (citations)." *Tahoe Shorezone Representation* v. *State*, Appendix E-16; *Lyon* v. *State*, Appendix A-75.

3. *The State Court Decisions At Issue Here Did Not Construe This Court's Holding In Illinois Central as a "binding principle of federal constitutional law." Even If Such a Construction Were Made, However, the Holdings Can Be Sustained on Independent and Adequate State Grounds.*

Even before this Court's holding in *Erie R. Co.* v. *Tompkins* (1938) 304 U.S. 64, "federal common law" did not govern real property disputes. *Swift* v. *Tyson* (1842) 41 U.S. (16 Pet) 1, 18–19. Since then, this Court has made it clear that property questions are determined by state, not federal law. *Oregon ex rel State Land Board* v. *Corvallis Sand & Gravel Co., supra,* 429 U.S. 363, 378.

This Court's opinion in *Illinois Central Railroad* v. *Illinois* (1892) 146 U.S. 387 has long been cited as a leading precedent in public trust law. It held, consistently with the authorities cited above, that the navigable waters of a state—whether salt or fresh—are impressed with a public trust for commerce, navigation and fisheries, and that the power of the Illinois Legislature to extinguish this trust did not extend to a wholesale conveyance of the entire Chicago waterfront to the Illinois Central Railroad and that a legislative grant could be subsequently revoked. In *Illinois Central,* this Court held, consistently with *Martin* v. *Waddell* (1842) 41 U.S. (16 Pet) 367 and *Arnold* v. *Mundy* (1821) 6 N.J.L. 1, that a legislature dealing with navigable waters is subject to inherent trust limitations. In short, that a state's ownership of its navigable waters is such an important attribute of its sovereignty that the power of the legislature to divest these rights is limited, and legislative expressions in that field—even ones amounting to express grants—are narrowly construed. *U.S.* v. *Oregon* (1935) 295 U.S. 1, 14; *People* v. *California Fish Co.* (1913) 166 Cal. 576, 138 P. 79.

The role of "federal common law" has changed vastly in these post-Erie doctrine times. But it is clear—both by its own terms and subsequent construction—that the *Illinois Central* rule is one of *state* common law. See *Illinois Central Railroad* v. *Illinois, supra,* 146 U.S. at 436–437; *Appleby* v. *New York* (1926) 271 U.S. 364, 395, n. 13. What is important here is that California had adopted a similar rule even before *Illinois Central* came down. *People* v. *Gold Run D & M Co.* (1884) 66 Cal. 138,

4 P. 1152; *Taylor* v. *Underhill* (1871) 40 Cal. 471. See, also, *City of Oakland* v. *Oakland Water Front Co.* (1897) 118 Cal. 160, 50 P. 277; *People* v. *California Fish Co., supra,* 166 Cal. 576, 138 P. 79. See, generally, Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 489–491 (1970).

The first and principal ground for the decisions below was the court's determination that the 1872 California Legislature had not intended to extinguish the public trust over the lands beneath nontidal navigable waters. That led to the conclusion that the trust had not been terminated, a conclusion based solely on the strong language in *People* v. *California Fish Co., supra,* 166 Cal. 576, 597, 138 P. at 86, to the effect that a legislative intent to terminate the trust "will not be implied if any other inference is reasonably possible," and that "if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation."

This Court has no jurisdiction to render advisory opinions. If, by virtue of the existence of adequate non-federal grounds for the state court decision, the same judgment would still issue from the state court after this court disposed of the federal question, there is no basis for the assumption of jurisdiction under 28 United States Code section 1257. (*Herb* v. *Pitcairn* (1945) 324 U.S. 117, 125–126.) The precedent presented by the *California Fish Co.* decision and relied upon by the court below constitutes such an independent, adequate state grounds for the decisions.

4. *A Waterward Boundary is, by Common Law, a Moveable One. It is Affected by Accretion and Reliction, Whatever Their Cause. This Court, in Adopting the Common Law Rule, Has Recognized Physical Realities and the Reasonable Expectations of Landowners.*

Finally, petitioners have complained of the decision below to the extent it provides for the determination of waterward boundaries on lakes and rivers that have been in large part affected by dams and levees since the nineteenth century. The court below has, as petitioners have urged in a different context, found that the common law applies, and thus the actual, established levels of Lake Tahoe and Clear Lake that littoral owners have been living with for many years are to be utilized in finding the high and low water marks. *State* v. *Superior Court (Fogerty)* (1981) 29 Cal.3d 247–249. Its opinion is both well-founded in precedent and practical.

There is no basis in law for the contention that the State's sovereign boundaries on nontidal waters extend to the high (or low) ordinary water line of the waterway in its "last natural condition." Once again, state law must decide this question of boundary under the *Corvallis* rule. The State's upland boundary of the beds of its navigable lakes and rivers is a moveable one. *City of Oakland* v. *Bouteau* (1919) 180 Cal. 83, 87, 179 P. 170, 172. Under common law, shifts in this boundary, whether they are caused naturally or by man's interference, cause changes. See *County of St. Clair* v. *Lovingston* (1874) 90 U.S. (23 Wall) 46, 68.

The only exception to this rule in California has been carved out by Civil Code section 1014, limiting an up-

land owner's rights to accretions to those caused by natural forces only. Under section 1014, the upland owner therefore does not acquire a right to accretions caused by artificial means. *Carpenter* v. *City of Santa Monica* (1944) 63 Cal.App.2d 772, 787–788, 147 P.2d 964, 971–973. Civil Code section 1014 does not affect the issue at Lake Tahoe, for instance, because the artificial raising of the lake by means of the dam has resulted in a *submergence* of upland—not an accretion. There is substantial authority to the effect that such a long-maintained artificial condition becomes in effect a new natural condition. *Chowchilla Farms, Inc.* v. *Martin* (1933) 219 Cal 1, 25 P.2d 435; *Natural Soda Products Co.* v. *City of Los Angeles* (1943) 23 Cal.2d 193, 143 P.2d 12, cert. denied 321 U.S. 793 (1944); *Wilbour* v. *Gallagher* (Wn. 1969) 462 P.2d 232, cert. denied 450 U.S. 878 (1970). Furthermore, there is considerable authority that, under the theory of prescription, the State's boundary continues to move landward when water levels rise as a result of a dam or like condition, causing "artificial submergence." The Arkansas, Iowa and Wisconsin courts have all held that land submerged by the erection of a dam or levee system on a navigable lake becomes the property of the State by virtue of prescription. *State* v. *Parker* (Ark. 1917) 200 S.W. 1014, 1015–1016; *Village of Pewaukee v.* Savoy (Wis. 1899) 79 N.W. 436, 437; *State* v. *Sorenson* (Iowa 1937) 271 N.W. 234, 237–238. Obviously, littoral owners whose lands are affected by an artificial raising or lowering of waters have ample remedies under state law. *City of Los Angeles* v. *Aitken* (1935) 10 Cal. 460, 52 P.2d 585. However, if they fail to assert them in a timely

manner, both state and private owners may become entitled to rely on the established artificial levels. *Lyon's* Appendix A-49–A-50; *Natural Soda Products Co.* v. *City of Los Angeles, supra,* 23 Cal.2d 193, 197, 143 P.2d 12; *Chowchilla Farms, Inc.* v. *Martin* (1933) 219 Cal. 1, 18, 25 P.2d 435.

This Court has accurately concluded, therefore, that the condition of the lake as it has existed since the construction of a dam in 1870 should be utilized in determining the ordinary high and low water lines. This method has the added advantage of being considerably more economical to ascertain since it will not be necessary to extrapolate supposed water levels to reach some assumed "last natural condition."

5. *The Issue of Estoppel Was Properly Decided.*

Although the issue of estoppel was raised by petitioners Tahoe Shorezone Representation before the court below, it was not raised before this Court in the petition of either party and should be deemed to have been waived. Nevertheless, we have been informed that it will be raised by amicus Pacific Legal Foundation. Although this issue had not been raised in petitioners' motion for partial summary judgment in trial court, petitioners chose to make it an issue before the California Supreme Court, and that court ruled adversely to them on the basis that "[e]stoppel will not be applied to the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public . . . " Lyon's Appendix A-43. That decision is well-supported by the holdings of this Court.

Petitioner Tahoe Shorezone Representation, which

presented this issue to the California court, cannot now be heard to allege that it was denied the opportunity to present a "significant defense" without a prior hearing. Nor can such a plea be heard on its behalf by a surrogate amicus.

Furthermore, neither estoppel nor administrative construction will be applied to defeat an important rule of public policy. The state learned this in the submerged lands cases when it offered evidence of administrative construction by the Department of Interior and its agents to show long-established ownership of the submerged lands. This Court had little trouble dealing with this argument:

> "Nor can we agree with California that the Federal Government's paramount rights have been lost by reason of the conduct of its agents. The state sets up such a defense, arguing that by this conduct the Government is barred from enforcing its rights by reason of principles similar to laches, estoppel or adverse possession. It would serve no useful purpose to recite the incidents in detail upon which the state relies for these defenses. Some of them are undoubtedly consistent with a belief on the part of some Government agents at the time that California owned all, or at least a part of the three-mile belt. . . . Assuming that Government agents could by conduct, short of a congressional surrender of title or interest, preclude the Government from asserting its legal rights, we cannot say it has done so here. . . . And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests

here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act (fn.)." *United States* v. *California* (1947) 332 U.S. 19, 39–40.

## CONCLUSION

The federal government held title to the navigable lands in trust for newly admitted states. Each state gained dominion over its navigable waters by virtue of constitutional law; not congressional grace. *Oregon ex rel State Land Board* v. *Corvallis Sand & Gravel Co., supra,* 429 U.S. 363. Although the initial boundary between the beds of navigable waters and the public lands subject to disposition is high water and this Court has consistently held that a high water boundary is the better rule, each state is free to determine for itself the bounds by which its sovereignty over navigable waters shall be measured. *Barney* v. *Keokuk, supra,* 94 U.S. 324.

In *Lyon* v. *State of California,* the California Supreme Court decided, as a matter of state law and contrary to the State's claim, that the littoral owners on navigable, nontidal lakes and rivers held to the ordinary low, rather than high, water mark. The Court further held that, consistent with long-established principles of common law and statutory construction, the failure of the California Legislature to terminate the public trust for commerce, navigation and fisheries (if, indeed, such

wholesale termination was possible) had precisely the same effect on nontidal navigable waters as it concededly had on tidal ones: fee had passed to the upland owners subject to the public trust. Such lands, between high and low water, if unimproved, remain subject to the public rights of commerce, navigation and fishery. They may be improved by the owners in ways "not incompatible" with the trust. *State* v. *Superior Court (Lyon), Lyon's* Appendix A-29, A-50. Furthermore, the State is prohibited from removing inconsistent improvements on behalf of trust uses without compensating the owners for their value. *State* v. *Superior Court (Fogerty), Lyon's* Appendix A-50, and cases cited therein.

To pass this camel of state law through the needle's eye of federal certiorari, petitioners have attempted to characterize the public trust doctrine, as applied by the California Supreme Court, as one of federal constitutional law. Nothing could be farther from the case. The public trust doctrine is an ancient one. It existed in the civil law, and was applied to the courts of England before American independence. Adopted to the unique conditions of the United States, it became an early doctrine of our common law. *Arnold* v. *Mundy, supra,* 6 N.J.L. 1; *Martin* v. *Waddell, supra,* 41 U.S. (16 Pet) 367; Sax, *supra.* It recognizes the unique and special values of navigable waters, and operates as a restraint on the alienation of such values by kings or legislatures. But in this country it does so as a doctrine of common law, shaped and determined by state courts. Its application in California is only the latest of a series of decisions commencing in 1864 *(People ex rel Pierce* v. *Morrill* (1864)

26 Cal. 336, 353; see Dunning, the Significance of California's Public Trust Easement for California Water Rights Law, 14 U.C. Davis L. Rev. 357, 363–367 (1980). The last such holding, *City of Berkeley* v. *Superior Court, supra,* 26 Cal.3d 515, 524, 606 P.2d 362, 366, cert. denied 66 L.Ed. 2d 48, ____ U.S. ____, (1980), was the subject of another petition for certiorari before this Court only last year. The petition was properly denied. This latest effort—which falls even shorter from presenting a federal question—should receive the same treatment.

DATED: August 24, 1981

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# Petitioner's Reply Brief

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No. 81-163

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1981

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*Petitioners,*

vs.

STATE OF CALIFORNIA, STATE LANDS COMMISSION OF THE STATE OF CALIFORNIA and DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA,
*Respondents.*

## PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS


Page

1. By the State's own admission, California had never recognized the existence of a public trust easement over the shorezone of nontidal navigable waters prior to the issuance of the decisions below ..... 1

2. The very genesis of this litigation and the State's zealous advocacy for the creation of this trust belie its assertion that the trust only minimally affects petitioners' right to use their property .... 5

3. The State's characterization of Illinois Central as merely a construction of Illinois law does not negate the California Supreme Court's reliance on it as a statement of federal law by which it was bound ..... 9

Conclusion ..... 10

## TABLE OF AUTHORITIES CITED

### Cases


| | Page |
|---|---|
| Agins v. City of Tiburon, 447 U.S. 255 (1980) | 5 |
| Anderson v. Trotter, 213 Cal. 414, 2 P.2d 373 (1931) | 4 |
| Arnold v. Mundy, 6 N.J.L. 1 (1821) | 3, 4 |
| Barney v. City of Keokuk, 94 U.S. (4 Otto) 324 (1876) | 2 |
| Boone v. Kingsbury, 206 Cal. 148, 273 P. 797 (1928) | 8 |
| Carpenter v. City of Santa Monica, 63 Cal.App.2d 772, 147 P.2d 964 (1944) | 7 |
| Colberg v. State of California, 67 Cal.2d 408, 432 P.2d 3 (1967), cert. denied, 390 U.S. 949 (1968) | 2 |
| Craig v. White, 187 Cal 489, 202 P. 648 (1921) | 4 |
| Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892) | 1, 9, 10 |
| City of Long Beach v. Mansell, 3 Cal.3d 462, 476 P.2d 423 (1970) | 7 |
| Maginnis v. Hurlbutt, 49 Cal.App. 460, 193 P. 606 (1920) | 4 |
| Marks v. Whitney, 6 Cal.3d 251, 491 P.2d 374 (1971) | 8 |
| Newcomb v. City of Newport Beach, 7 Cal.2d 393, 60 P.2d 825 (1936) | 8 |
| People v. Gold Run D. & M. Co., 66 Cal. 138, 4 P. 1152 (1884) | 2, 4 |
| Shively v. Bowlby, 152 U.S. 1 (1894) | 3 |


### Statute


| | |
|---|---|
| California Civil Code Section 1014 | 7 |


### Other Authority


| | |
|---|---|
| Taylor, "Patented Tidelands: A Naked Fee," 47 Calif. St. BarJ. 420 (1972) | 8 |

## PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondents State of California, State Lands Commission of the State of California and Department of Fish and Game of the State of California (hereafter collectively referred to as the "State") have predicated their opposition to the Petitions for Writs of Certiorari primarily on the assertion that the petitions do not present a federal question adequate to invoke this Court's jurisdiction. In particular, they maintain that the decisions below were based on a "state common law" which, they assert, has always recognized a public trust easement in lands riparian to nontidal waterbodies; that the California Supreme Court's reliance on *Illinois Central R.R. v. Illinois,* 146 U.S. 387 (1892), was superfluous, and that certain state cases might independently be read as imposing such a trust on these lands; and that the imposition of a public trust easement (averred to have always existed though recognized for the first time in the decisions below) effects no appreciable change in petitioners' right to use their property and, consequently, does not quite amount to a taking. This Reply Memorandum addresses these assertions.

### 1. By The State's Own Admission, California Had Never Recognized the Existence of a Public Trust Easement over the Shorezone of Nontidal Navigable Waters Prior to the Issuance of the Decisions Below

The State's contention that the decisions below were predicated not on federal law but solely on "state common law" proceeds on the premise that California cases addressing tidelands (lands covered by the daily ordinary tides)

are to be applied to lands on the shores of nontidal navigable waterbodies.[1] The disparate histories of the rules applicable to tidal and nontidal waterbodies at common law, as well as in the jurisdictions of this country, contradict that proposition.

It scarcely warrants citation that English common law equated "navigability" with the ebb and flow of the tide and recognized only a public right of passage over nontidal waters to the extent they were capable of sustaining navigation. With minor exceptions, the English rule confining "navigable waters" to those subject to the tides received approval of the former English colonies and the States subsequently formed from the western possessions of those States.[2]

While the restrictive common law test of navigability was slowly modified so as to recognize the navigability in fact of many of this county's inland waterways (with the eventual approval of this Court in *Barney v. City of Keokuk*, 94 U.S. (4 Otto) 324 (1876)), at the time of California's admission to the Union in 1850, *no* jurisdiction had asserted sovereign interests in its nontidal waters

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[1]With the sole exception of *People v. Gold Run D. & M. Co.*, 66 Cal. 138, 4 P. 1152 (1884), discussed *infra* at p. 4, all of the California cases relied upon by the State in support of its argument that the decisions below were based on "state common law" involve tidelands. The State's quotation from *Colberg v. State of California*, 67 Cal.2d 408, 423, 432 P.2d 3 (1967), *cert. denied*, 390 U.S. 949 (1968) (Brief in Opposition, p. 10) is misleading since that case involved the Stockton Deep Water Ship Channel, " . . . a navigable tidal waterway." *Id.* at 412.

[2]*See*, generally, App. A-77 through A-82 of *Lyon* Appendix to Petition for Writ of Certiorari, summarizing the respective states' rules governing their inland waters.

landward of low water mark.[3] In contrast, the states were virtually unanimous in asserting sovereign title and public-trust interests in lands underlying *tidal* waters to the *high*-water mark.[4] California's effort to find a unified "state common law" embracing tidal and nontidal waters alike is historically and legally unsound.

The State understands this. While first contending that "[t]he decision below . . . was merely a restatement of California's longstanding rule of property to that effect" (Brief in Opposition, p. 6), the State then finds it cannot avoid conceding the point: ". . . [t]he failure of the State to assert its trust rights in lands below high water [on nontidal waters] can hardly be elevated to a 'rule of property.'" (Brief in Opposition, p. 16, citing the decision below, 29 Cal.3d at 231.) Again, in support of its statement that "[t]his rule is not peculiar to California . . ." (Brief in Opposition, p. 9), the State cites the New Jersey case of *Arnold v. Mundy*, 6 N.J.L. 1 (1821). Far from supporting this attempted equation, however, the *Arnold* case, which construed a grant of land bordering a tidal river, expressly acknowledged the different treatment historically accorded tidal and nontidal waterbodies:

> Now, upon this it is to be observed, that though a grant of land to a subject or citizen, bounded upon a fresh water stream or river not navigable, and where the tide neither ebbs nor flows, extends to the channel of such river, *usque ad filum aquae*, as they have it in our old books; yet that a grant of land bounded upon a river or other water which is *navigable*, and *where the tide does ebb and flow*, extends to the edge of the

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[3] *Id.*

[4] For a thorough discussion of the rules adopted by the respective states governing their tidal waterbodies, *see Shively v. Bowlby*, 152 U.S. 1, 18-31 (1894).

> water only, that is to say, to high water mark, and no further. (Emphasis added.)

*Id.* at 67.

The State goes on to argue that the public trust's " . . . application to nontidal, as well as tidal, navigable waters in California is beyond question." (Brief in Opposition, p. 9.) The sole authority offered in support of this sweeping declaration, however, is *People v. Gold Run D. & M. Co.*, 66 Cal. 138, 4 P. 1152 (1884). In that case, the owner of lands bordering the American River (where it was concededly nonnavigable) was enjoined from discharging hydraulic-mining debris into the river. That discharge had substantially raised the beds of both the American and Sacramento Rivers downstream, impairing the ability of steamers to navigate them. In affirming the issuance of the injunction, the California Supreme Court relied not on any purported public-trust interest in lands adjacent to rivers, but simply on the ancient principle that the impairment of a stream's navigability is a nuisance. *Id.* at 147.

Finally, and perhaps most importantly, the State's arguments regarding a "state common law" ignore the myriad of cases which have addressed the extent and nature of private and public rights in navigable nontidal waters. Indeed, Clear Lake—the waterbody involved in the *Lyon* action—has been considered by the California Supreme Court on two occasions and the Court of Appeal once before. *Anderson v. Trotter*, 213 Cal. 414, 2 P.2d 373 (1931); *Craig v. White*, 187 Cal. 489, 202 P. 648 (1921); *Maginnis v. Hurlbutt*, 49 Cal.App. 460, 193 P. 606 (1920). In each instance, it was held that private ownership in fee extends to low water. There is no suggestion in any of the three opinions that the area between high and low water

is subject to an easement in favor of the State. Significantly, the term "public trust" is never once mentioned.

The State of course is compelled to advance the notion of a pre-existing "state common law." Without it, the State of California and its Supreme Court cannot avoid the constitutional infirmities of impressing these lands with such a trust at this late date.

**2. The Very Genesis of This Litigation and the State's Zealous Advocacy for the Creation of This Trust Belie Its Assertion That the Trust Only Minimally Affects Petitioners' Right to Use Their Property**

Petitioners are struck by the State's claim that its exercise of public-trust powers would be severely confined and would in fact require the payment of just compensation. Indeed, it asserts that petitioners' free use and enjoyment of their lands now impressed with this public trust does not require ". . . the affirmative approval of anyone." (Brief in Opposition, p. 16.) Yet in 1976 the State denied petitioner Lyon's request to improve his property in accordance with detailed development plans expressly for the reason that it was now claiming a public-trust interest in lands adjacent to navigable but nontidal waters. That denial led to this litigation, and has prohibited Lyon from making any profitable use of his property during the past five years.

These facts render irrelevant to say the least the State's suggestion that the failure to submit development plans precludes review by this Court. Similarly aside the point is the State's attempt to equate the exercise of the public trust with the police power. Relying on its construction of this Court's holding in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the State argues that there has been no taking since there may yet be the potential for peti-

tioners' making an economic use of their property. The answer to this assertion is that the public trust is not an exercise of the police power—it is an easement, a property interest. Moreover, the contention is at odds with the very rationale offered by the court below for creating this public trust: "The exercise of the police power has proved insufficient to protect the shorezone." *State of California v. Superior Court (Fogerty)*, 29 Cal.3d 240, 247 (1981).

But perhaps the most ironic aspect of the State's contentions is its insistence that its powers under the trust are extremely confined. Were it necessary, petitioners could provide this Court with hundreds of examples of the State asserting virtually unfettered discretion in dictating "proper" trust uses to which privately owned *tidelands* can be put. We think, however, that a few representative examples will suffice.

Of perhaps particular significance to this Court is the position adopted by the State in litigation pending against the United States (as the upland owner of public-domain lands) regarding ownership of the bed of Mono Lake—a nontidal navigable waterbody situated in eastern California. In its complaint, the State asserts that the reliction of Mono Lake's waters (solely caused, not insignificantly, by State permits allowing the diversion of the lake's waters) does not alter the boundaries fixed on the date of California's admission to the Union.[5] By force of the California Supreme Court's decisions in *Lyon* and *Fogerty*, the

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[5]This position—that the artificial lowering of navigable waters does not effect a boundary shift from the "last natural condition"—directly conflicts with the State's contentions in this proceeding. (Brief in Opposition, pp. 22-26.) As the State properly acknowledges in the Mono Lake litigation, artificial shoreline changes (as is the case at Clear Lake and Lake Tahoe) do *not* alter the boundary

allegations continue, two boundaries must be considered—the high water boundary below which the public trust easement will be exercised and the low water boundary to which the United States' title is concededly held to extend:

> [T]he California Supreme Court [in *Lyon*] also concluded that lands between the high and low water marks, were impressed with an inalienable public trust easement in favor of California and that this easement was not merely confined to the traditional expression of "commerce, navigation and fishery" but included recreational uses and the right to preserve such lands in a natural state. *Id.* at 230-231. The result of this holding is that the fee title of the United States as littoral owner to [sic] Mono Lake, extends to the ordinary low water mark of Mono Lake and this fee ownership is subject to a public trust easement, in favor of the State.

Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment, filed Aug. [illegible], 1981, *State of California, et al. v. United States of America, et al.*, U.S. District Court for the Eastern District of California, No. Civil S-80-696 LKK, pp. 9-10.

Not only does the State assert the right to impose the traditional strictures of the public trust for commerce, navigation and fishing over federal lands, but also to appropriate these lands for recreational purposes without payment of compensation. Alternatively, the State asserts, it can prohibit the Government from making *any* use of its lands by "preserv[ing] such lands in a natural state." By way of foreseeing just how rigidly the California courts will "confine" the State's power to exercise its new public

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between sovereign and private interests. Calif. Civil Code § 1014; *Carpenter v. City of Santa Monica*, 63 Cal.App.2d 772, 147 P.2d 964 (1944); *City of Long Beach v. Mansell*, 3 Cal.3d 462, 469, n. 4, 476 P.2d 423 (1970).

trust easement over the shores of inland waterways, it is enlightening to review the California cases challenging the State's dictation of public uses to which privately owned *tidelands* are to be put. The courts have deferred to the State's decisions almost without exception. *See, e.g., Marks v. Whitney,* 6 Cal.3d 251, 259-260, 491 P.2d 374 (1971); *Newcomb v. City of Newport Beach,* 7 Cal.2d 393, 60 P.2d 825 (1936); and *Boone v. Kingsbury,* 206 Cal. 148, 273 P. 797 (1928).

The public-trust rights which the State seeks to have in riparian lands, and which if these decisions are not reversed, will very predictably be exercised, are by no means as limited as the State would have this Court believe. The State's Assistant Attorney General in this action has expressed a view of the State's public-trust powers markedly at odds with the modest characterization of those powers he makes in California's Brief herein. Writing of the public trust as it applies to tidelands in California, he concludes:

> From this, we may conclude that under *Marks* no private use of undeveloped or relatively undeveloped tidelands can be made by the private patentee of such lands [read "owners of riparian lands"] with any assurance that it will not be inconsistent with the remaining public trust easement. *To proceed safely with any development the private patentee will have to obtain a legislative finding that his particular lands are no longer necessary for trust purposes.* (Emphasis added.)

Taylor, "Patented Tidelands: A Naked Fee," 47 Calif.St. BarJ. 420, 486 (1972).

### 3. The State's Characterization of Illinois Central as Merely a Construction of Illinois Law Does Not Negate the California Supreme Court's Reliance on it as a Statement of Federal Law by Which it was Bound

In a further effort to deprecate the federal questions presented by these petitions, the State advances the rather startling argument that this Court's decision in *Illinois Central R. R. v. Illinois*, 146 U.S. 387 (1892), was merely representative of Illinois law. Although petitioners have always maintained that, the State has abruptly shifted its position on this question, a fact which can be observed by this representative quotation from one of its briefs filed in the California Supreme Court's proceedings in *Fogerty:*

> The United States Supreme Court in the case of *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387, which has been described as the "lodestar" of the public trust doctrine, *directly held that under the common law of England the public trust doctrine is not limited to tidal waters* (emphasis added) but applied with equal force to *all navigable waters.* (Emphasis in original.)

Respondents' Replication To Answer To Petition For Writ Of Mandamus With Supplemental Memorandum of Points and Authorities, p. 16.

While the State may recant *its* position that *Illinois Central* enunciated a binding rule of federal law, the holding of the California Supreme Court is unchanged:

> In our view, *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018, 13 S. Ct. 110] which we described in *City of Berkeley* as the "seminal case on the scope of the public trust doctrine" (26 Cal. 3d at p. 521), *settled the issue.* It held very clearly that the applicability of the public trust doctrine does not turn upon whether a body of water is subject to

> the ebb and flow of the tide, but upon whether it is navigable in fact. (Emphasis added.)

*State of California v. Superior Court (Lyon)*, 29 Cal.3d at 227 (1981).

Moreover, the State's newly formed view of the reach and effect of *Illinois Central* begs the central question presented by these petitions: What did the Court intend the reach of its decision in *Illinois Central* to be? Since that case was decided in 1892, it has been cited by many courts for many different and often inconsistent propositions. Although *Illinois Central* may have been a clear expression of Illinois law at the time it was decided, the principles enunciated therein have been interpreted in such a fashion that it now means all things to all people. Given the past conduct of California and many other states in authorizing absolute private ownership of all or a portion of the beds of their navigable nontidal waters, clarification of the reach of *Illinois Central* in light of the California Supreme Court's decisions below is required.

## CONCLUSION

For the reasons briefed in our Petition, and in this Reply, we respectfully urge that writs of certiorari issue to the California Supreme Court.

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# Amicus Brief

1

Nos. 81-163; 81-182

# In the Supreme Court

OF THE

## United States

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RAYMOND R. LYON, et al.,
*Petitioners,*

VS.

STATE OF CALIFORNIA STATE LANDS COMMISSION, et al.,
*Respondents.*

TAHOE SHOREZONE REPRESENTATION,
*Petitioners*

VS.

STATE OF CALIFORNIA, et al.,
*Respondents.*

**BRIEF OF AMICI CURIAE CALIFORNIA LAND TITLE ASSOCIATION AND CALIFORNIA ASSOCIATION OF REALTORS IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA**

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## QUESTIONS PRESENTED

The California Supreme Court has created a public trust on private lands the State has never owned or has never claimed. By doing so, the Court has taken virtually all of the incidents of property ownership without compensation and without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution. These decisions, if allowed to stand, will support a similar taking of property from riparian and littoral property owners in at least 38 other states.

Amici refer to and incorporate herein the description and citations of the decisions of the California Supreme Court, the statement of jurisdiction of this court, the questions presented, the statement of the case, and the federal consitutional provisions involved in the issues presented in this case, as set forth in the two Petitions.

In relation to the issues addressed in the Petitions on file, the decisions below raise the following additional questions:

I. Assuming that a public trust can be imposed on the shorezone of non-tidal navigable waters, can the trust be imposed upon waters that were not "navigable" under the *federal test* of navigability for title purposes when California became a state?

II. Assuming that the public trust can be imposed on the shorezone of non-tidal navigable waters, upon an artifical raising of the water level, can the trust be enforced against the artifically created shorezone?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions presented | i |
| Parties | 2 |
| Reasons for granting the writs | 3 |
| 1. Importance of the decisions of the California Supreme Court and their effect on private property rights | 3 |
| 2. The "tidelands trust" does not apply to the shoreline of non-tidal navigable waters | 5 |
| 3. Based upon an expanded concept of "navigable", under state law, the California Court applied the public trust to the shorezone of lakes and rivers that it never held in sovereign ownership under Federal law | 11 |
| 4. The creation of the "tidelands trust" on the artificially created shorezone constitutes a deprivation of property without compensation | 14 |
| 5. The cumulative effects of the decisions of the California Supreme Court result in a blatant confiscation of private property | 17 |
| Conclusion | 19 |

## TABLE OF AUTHORITIES CITED

### Cases


| | Page |
|---|---|
| Barney v. Keokuk, 94 U.S. 324 (1876) | 5 |
| City of Berkeley v. Superior Court, 26 Cal.3d 515, 606 P.2d 362 (1980) | 8 |
| Bohn v. Albertson, 107 Cal.App.2d 738, 238 P.2d 128 (1951) | 7, 13 |
| Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) | 18 |
| Brewer-Elliot Oil & Gas Co. v. United States, 260 U.S. 77 | 12 |
| Chicago B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897) | 19 |
| The Daniel Bell, 77 U.S. (10 Wall.) 557 (1871) | 12 |
| Dimmick v. Dimmick, 58 Cal.2d 417, 374 P.2d 824 (1962) | 15 |
| Donnelly v. United States, 228 U.S. 243 (1912) | 8 |
| Forestier v. Johnson, 164 Cal. 24, 127 P. 156 (1912) | 8 |
| Hardin v. Jordan, 140 U.S. 371 (1891) | 5, 8 |
| Hardin v. Shedd, 190 U.S. 508 (1903) | 5 |
| Hitchings v. Del Rio Woods Recreation & Park Dist., 55 Cal.App.3d 560, 127 Cal.Rptr. 830 (1976) | 7, 13 |
| Hughes v. State of Washington, 389 U.S. 290 (1967) | 19 |
| Kaiser Aetna v. United States, 444 U.S. 164 (1979) | 12, 14, 16 |
| Kean v. Calumet Canal & Improv. Co., 190 U.S. 452 (1903) | 18 |
| Laubisch v. Roberdo, 43 Cal.2d 702, 277 P.2d 9 (1954) | 15 |
| Leo Sheep Co. v. United States, 440 U.S. 668 (1979) | 10, 11, 18 |
| City of Los Angeles v. Aitken, 10 Cal.App.2d 460, 52 P.2d 585 (1935) | 7 |

## Table of Authorities Cited

### Cases

Page

Marks v. Whitney, 6 Cal.3d 251, 491 P.2d 374 (1971).... 8

Massachusetts v. New York, 271 U.S. 65 (1926) ..... 5, 8

Mobile Transportation Co. v. Mobile, 187 U.S. 479 (1903) ..... 8

Montana v. United States, ..... U.S. ....., 101 S.Ct. 1245, 67 L.Ed.2d 493 (1980) .....5, 12

Oklahoma v. Texas, 258 U.S. 574 (1922) ..... 12

Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) .....5, 6, 18

People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913) ..... 8

People v. Miles, 143 Cal. 636, 77 P. 666 (1904) ..... 7

People v. Sweetser, 72 Cal.App.3d 278, 140 Cal.Rptr. 82 (1977) ..... 7

People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374 (1897) ..... 7

People ex rel. Baker v. Mack, 19 Cal.App.3d 1040, 97 Cal.Rptr. 448 (1971) .....4, 7, 13

The Propeller Genessee Chief v. Fitzpatrick, 12 How 443 (1852) ..... 12

Prune Yard Shopping Center v. Robins, 447 U.S. 74, 100 S.Ct. 2035 (1980) ..... 18

San Diego Gas & Electric v. City of San Diego, ..... U.S. ....., 101 S.Ct. 1289 (1981) ..... 11

Shively v. Bowlby, 152 U.S. 1 (1894) ..... 5

United States v. Holt State Bank, 270 U.S. 40 (1929) ....8, 12

United States v. Stoeco Homes, Inc., 498 F.2d 597, (3rd Cir. 1974) cert. den. 420 U.S. 927 ..... 19

## Table of Authorities Cited

### Cases

Page

United States v. Title Insurance & Trust Co., 265 U.S. 472 (1924) ..... 18

United States v. Utah, 283 U.S. 64 (1931) ..... 5, 12

Utah v. United States, 403 U.S. 9 (1971) ..... 12

Ward v. Mulford, 32 Cal. 365 (1867) ..... 8

Water Power Co. v. Water Com'rs, 168 U.S. 349 (1897) ..... 5

West v. Evans, 29 Cal.2d 414, 175 P.2d 219 (1946) ..... 15

Wilcox v. Jackson, 38 U.S. 498, 517 13 Pet. 498 ..... 6

### Constitutions

California Constitution, Article X, Section 4 ..... 7

United States Constitution:

Fifth Amendment ..... i, 17, 20

Fourteenth Amendment ..... i, 17, 20

### Statutes

California Civil Code, Section 3479 ..... 7

California Code of Civil Procedure, Sections 321-325 ..... 15

California Penal Code, Section 370 ..... 7

California Public Res. Code, Sections 2100-21176 ..... 11

### Other Authorities

3 Am.Jur.2d, Adverse Possession, § 6 at page 86, §§ 96-104 at pages 176-188 ..... 15

3 Miller & Starr, The Current Law of California Real Estate, §§ 19:1-19:2 at pages 394-400, § 19:30 at page 440 ..... 15

Nos. 81-163; 81-182

# In the Supreme Court

OF THE

# United States

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OCTOBER TERM, 1981

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RAYMOND R. LYON, et al.,
*Petitioners,*

VS.

STATE OF CALIFORNIA STATE LANDS COMMISSION, et al.,
*Respondents.*

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TAHOE SHOREZONE REPRESENTATION,
*Petitioners,*

VS.

STATE OF CALIFORNIA, et al.,
*Respondents.*

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**BRIEF OF AMICI CURIAE CALIFORNIA LAND TITLE ASSOCIATION AND CALIFORNIA ASSOCIATION OF REALTORS IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA**

## PARTIES

Amici Curiae California Land Title Association ("CLTA") and California Association of Realtors ("CAR") (herein "Amici") have received the written consents to file this brief from each of the parties in these proceedings and such consents have been filed with this court. Amici were granted permission to file briefs before the California Supreme Court in *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210 (1981).

Amici support the petitions of the Petitioners and respectfully pray that writs of certiorari issue to review the judgments and opinions of the California Supreme Court entered in this proceeding on March 20, 1981. This brief is filed because of the important federal questions presented and because of the enormous impact on private property rights resulting from the decisions of the California Supreme Court.

Amicus Curiae CAR is an organization composed of approximately 140,000 real estate licensees in California. One of the fundamental objectives of this organization is to protect and preserve the rights of private property ownership. The decisions of the California Supreme Court will deprive thousands of property owners of valuable interests in their property without compensation contrary to the Constitution of the United States and Amicus wishes to urge this Court to consider the legal and practical effects of these decisions and their inconsistency with the federal rules previously declared by this Court.

Amicus Curiae CLTA is an organization of title insurers and underwritten title companies that do business in the State of California. The members of this organization have studied and researched the issues presented in these cases for over 100 years and the members of Amicus have advised their clients and insured titles in reliance upon the pre-

vious consistent pattern of legislative, judicial and administrative decisions and rulings in California. The subject decisions of the California Supreme Court will have a substantial adverse effect on the title and value of riparian and littoral property in California, and this brief is filed on behalf of the owners of such property to protect the sanctity of their property rights, and on behalf of the members of Amicus who will suffer substantial financial losses as a result of the decisions of the California Supreme Court.

## REASONS FOR GRANTING THE WRITS

### 1. IMPORTANCE OF THE DECISIONS OF THE CALIFORNIA SUPREME COURT AND THEIR EFFECT ON PRIVATE PROPERTY RIGHTS

The conclusions of the California Supreme Court departed from existing precedent and changed law that has been established for more than 100 years. The cumulative effect of these decisions constitutes an unprecedented and wholesale "taking" of the valuable rights of property ownership on property heretofore owned without restriction and on property to which the state had not previously made any claim of title or use.[1]

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[1]For over 100 years property owners and persons in business have invested large sums of money to acquire and improve lands in reliance upon an unbroken line of consistent announcements by all branches of State Government in California that these owners owned and could use their riparian and littoral property to the ordinary natural low water line. Millions, perhaps billions of dollars have been invested in the most valuable property in this State in reasonable reliance upon existing law. A reversal of these rules in California will cause enormous, substantial and incalculable harm and loss to thousands of property owners, without due process and without compensation—a result not to be countenanced in a democratic society.

These decisions have an impact of national proportions. In California, these decisions affect the titles of riparian and littoral property owners along at least 4000 lineal miles of shoreline on fresh water navigable lakes and rivers in the state.[2] If the decisions of the Court below are not reviewed by this Court, the State of California will acquire virtual ownership of perhaps millions of acres of land within the state (Lyon Appendix, A-4, A-30 (dissent), A-43) without payment of compensation. Further, the precedential impact of these California decisions potentially will affect untold millions of acres of littoral and riparian lands in at least 24 other states that also have adopted the low water mark as the boundary line for private property bordering non-tidal navigable lakes and rivers, and in the 14 states that have held that the beds of such water are in private ownership. (See TSR Appendix E-18 to E-23).

In reaching these decisions the California Supreme Court erred in three respects. Contrary to the conclusions of the Court below,

a. The "tidelands trust" does not apply to non-tidal navigable waters.

b. The test of "navigability" for the imposition of the trust is the federal test of navigability for title purposes, and not the broader state test applicable to the navigational servitude.

c. Upon an artificial increase in the level of the water the trust does not apply to the artificial shorezone between

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[2]These figures cited by the California Supreme Court are only the minimum. The State is free to treat other properties as "navigable" even though they are not listed as such by the State Lands Commission. See *People ex rel. Baker v. Mack*, 19 Cal.App.3d 1040, 1048-1049, 97 Cal.Rptr. 448 (1971).

the artificial high water mark and the artificial low water mark.

## 2. THE "TIDELANDS TRUST" DOES NOT APPLY TO THE SHORELINE OF NON-TIDAL NAVIGABLE WATERS

The Petitioners have presented arguments regarding the non-applicability of the "tidelands trust" to non-tidal navigable waters. (Lyon Petition, pages 14-19; Tahoe Shorezone Representation ("TSR") Petition, pages 11-17). Amici wish to amplify these arguments.

The decisions of the California Supreme Court undoubtedly will cause confusion among the various states and probably will foster considerable litigation regarding riparian and littoral property rights. The United States Supreme Court has held that each state received the title to the beds under non-tidal navigable waters upon statehood[3] but it has also held that each state was free to select the boundary of its sovereign title.[4]

In response to this directive various states have selected the low water mark, or the high water mark, or some combination thereof as applied to different types of water-

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[3] *Montana v. United States*, ... U.S. ..., 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493, 501 (1980); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *United States v. Utah*, 283 U.S. 64, 75 (1931); *Massachusetts v. New York*, 271 U.S. 65, 89 (1926); *Hardin v. Jordan*, 140 U.S. 371, 382 (1891); *Barney v. Keokuk*, 94 U.S. 324, 338 (1876).

[4] *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372, 375, 378-381 (1977); *Massachusetts v. New York*, 271 U.S. 65, 91 (1926); *Water Power Co. v. Water Com'rs*, 168 U.S. 349, 366 (1897); *Shively v. Bowlby*, 152 U.S. 1, 31-47 (1894); *Hardin v. Jordan*, 140 U.S. 371, 380, 382, 384, 393, 402 (1891); *Hardin v. Shedd*, 190 U.S. 508, 519 (1903); *Barney v. Keokuk*, 94 U.S. 324, 338 (1876).

ways as the boundary between the sovereign ownership of the beds and the private ownership of the adjacent riparian and littoral properties.[5] In effect, the U.S. Supreme Court has determined that *under federal law* there was a grant of the beds of such waters to the states but each grantee determined the limits of the grant, and thereby *the limits of its sovereign ownership.*[6]

The California Supreme Court now finds that *in absence of a selection* of the boundary, the State received the title automatically to the high water mark on all navigable waters in the State *as a matter of federal law.* However, the United States Supreme Court has never questioned the respective boundaries selected by the states, has never held that a state automatically received title to the high water mark *without an election* (where, as in California, the State has subsequently selected the low water mark), and it has never indicated that a state retains some duty or right to reserve a "trust" over the shorezone of such waters after the boundary has been selected.

The Court below admits that prior to 1872 the State had never made any claim to any interest in title or the use of the shorezone above the low water mark on the non-tidal, navigable waterways of California. (Lyon Appndix, A-6). It admits that in 1872 the Legislature selected the low water mark as the boundary of such waterways. It also admits

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[5]Other states provide that the boundary of lands bordering the water is at the center of the lake or river and the state has no title interest in the bed. See TSR Appendix, E-18 to E-23.

[6]*Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, at 377 (1977), quoting *Wilcox v. Jackson*, 38 U.S. 498, 517 13 Pet. 498, 517. Thus, the state did not receive the title to the high water mark *in absence of an election.* The limits of the sovereign title were restricted to the boundary *the state selected* and that boundary was not determined until the State made its selection. In the case of California, this was at the low water mark.

that for 100 years the legislative, judicial, and administrative branches of the State Government confirmed private titles at the low water mark (Lyon Appendix, A-14 to A-18) and that the state encouraged and permitted uses incompatible with the alleged public trust without ever indicating in any manner that the state made a claim to the shorezone. (Lyon Appendix A-27).

During this 100 year period California adopted, and continuously reinforced, the existence of a *navigational easement* over the *surface* of all non-tidal, navigable waters.[7] This public right is merely a right of passage on, over and across the *water* and includes the rights to boat, fish and bathe upon and in the *water*.[8] As an easement, it is coexistent with the water's surface, it expands and contracts seasonally with the rise and fall of the level of the water,[9] and can be exercised over private property when the water level rises above the low water mark,[10] but it does not give the State any interest in the bed under the water.

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[7]Cal. Const., Art. X, Sect. 4; CC § 3479; Pen. C. § 370. *People v. Sweetser*, 72 Cal.App.3d 278, 140 Cal.Rptr. 82 (1977); See *People v. Truckee Lumber Co.*, 116 Cal. 397, 339-401, 48 P. 374 (1897); *Bohn v. Albertson*, 107 Cal.App.2d 738, 238 P.2d 128 (1951) (dicta re non-tidal waters); *City of Los Angeles v. Aitken*, 10 Cal.App.2d 460, 468, 470, 52 P.2d 585 (1935).

[8]*Hitchings v. Del Rio Woods Recreation & Park Dist.*, 55 Cal. App.3d 560, 568, 127 Cal.Rptr. 830 (1976); *People ex rel. Baker v. Mack*, 19 Cal.App.3d 1040, 1045, 97 Cal.Rptr. 448 (1971); *Bohn v. Albertson*, 197 Cal.App.2d 738, 238 P.2d 128 (1951).

[9]*People v. Miles*, 143 Cal. 636, 645, 77 P. 666 (1904); *Hitchings v. Del Rio Woods Recreation & Park Dist.*, 55 Cal.App.3d 560, 571, 127 Cal.Rptr. 830 (1971); *Bohn v. Albertson*, 107 Cal.App.2d 738, 238 P.2d 128 (1951).

[10]*People v. Sweetser*, 72 Cal.App.3d 278, 140 Cal.Rptr. 82 (1977).

Prior to 1981, the *public trust* in California has been imposed exclusively on lands covered and uncovered by the tide on a daily basis and every prior California decision limited the application of the trust to tidal waters only.[11] Historically, the trust arose in reference to tidal waters only[12] and the United States Supreme Court has disclaimed the application of the trust to waters other than tidal waters.[13]

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[11]*City of Berkeley v. Superior Court*, 26 Cal.3d 515, 606 P.2d 362 (1980); *Marks v. Whitney*, 6 Cal.3d 251, 491 P.2d 374 (1971); *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913); *Forestier v. Johnson*, 164 Cal. 24, 127 P. 156 (1912); *Ward v. Mulford*, 32 Cal. 365 (1867).

[12]The California Supreme Court acknowledges that the "tidelands trust" had its origin in Roman law and historically applied only to tidelands. (Lyon's Appendix, B-19).

[13]"The right of public fishery is never mentioned except in connection with tide waters where the title to the land is in the crown. It is never said that this right exists in lakes or ponds, or in any other fresh waters." *Hardin v. Jordan*, 140 U.S. 371, 389 (1891). Also see, *Massachusetts v. New York*, 271 U.S. 65 (1926): "The application of that rule (that a conveyance to the shore is to the high water mark) to conveyances of land bordering upon non-tidal waters is supported neither by reason nor by authority. The lack of clear definition, by natural land marks, of the shore of non-tidal waters, would make its application impracticable. It would deny to grantees all access of such waters except on the irregular and infrequent occasions of flood, *since there are no public rights in the shores of non-tidal waters*, and the abutting owner could not cross the shore to the water without trespass. Such a result would contravene public policy and defeat the intention with which conveyances are normally made." (271 U.S., at 93 [emphasis added]). In *Donnelly v. United States*, 228 U.S. 243, 262 (1912), *United States v. Holt State Bank*, 270 U.S. 40 (1929) and *Mobile Transportation Co. v. Mobile*, 187 U.S. at 479 (1903), the Court confirmed a state's conveyance of the title to the shorezone good against the state without reference to any reserved public trust rights in the state.

This *new* doctrine of a non-tidal "public trust" created by the California Supreme Court now places a far greater burden on riparian and littoral land and operates to strip this land of its principal value and utility such that it amounts to practical total ownership of the shorezone by the State. The confiscation resulting from this decision is exaggerated by the unusually broad public rights under the "tidelands trust" in California. *The "public trust" doctrine in California is more extensive and considerably more onerous than in other states.* The public has all of the attributes and incidents of ownership (except for the privilege of paying taxes, the obligations of maintenance, and liability to those who come upon the land). It can use the trust property for any recreational use or any future public needs that may arise, or it can require the property owner to preserve the trust property in its natural state and preclude all improvements. (Lyon Petition, pages 20-21; TSR Petition, pages 18-19, n. 30).

The Court below held that the public trust in the shorezone was created by an *implied reservation* at the time the titles were established at the low water mark in 1872. However, this question must be examined against the backdrop of history. In 1850 the new state needed to be developed, overflowed lands needed to be reclaimed, and shorezones needed to be improved. The emphasis in the 1800's was on water rights and not titles or future public uses. The intent of the state in establishing the low water mark boundary was to foster and encourage the reclamation, development and improvement of the shorezone.[14]

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[14]"The history of development of our great agricultural valleys and related residential development is directly in conflict with the asserted common law trust the majority seeks to impose." (Dissent in *Lyons*, Lyon Appendix, A-34 to A-36).

The circumstances in this case are strikingly similar to the circumstances that were the basis of the decision in *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979). In this case, as in *Leo Sheep*, the state does not claim any express reservation and *it did not have any intent* to reserve the vast shorezone area *for future* expansive *recreational* uses or to retain it in its natural condition at a time when it intended to encourage the expenditure of private funds for its improvement. Such a reservation was not a necessity during the early years of statehood and generations of conveyances have issued without any express claim of a reserved interest being made by the state.

The conclusion of the court in *Leo Sheep* is directly applicable in this case[15] and the California Supreme Court should not be permitted to destroy the certainty and predictability of land titles to upset the settled expectations of thousands of property owners.[16]

The asserted justification for the California Court's unprecedented extension of the public trust doctrine is the public need to protect the environment and to provide recreational opportunities for the public. (Lyon Appendix, A-4, A-43 to A-45) (Lyon's Appendix, A-46). Recognizing

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[15]"So both as a matter of common law doctrine and as a matter of construing congressional intent, we are unwilling to imply rights-of-way, with the substantial impact that such implication would have on property rights granted over 100 years ago, in absence of a stronger case for their implication than the Government makes here." *Leo Sheep Co. v. United States*, 440 U.S. 668, at 681-682 (1979).

[16]"This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation." *Leo Sheep Co. v. United States*, 440 U.S. 668, at 687-688 (1979).

the importance of these needs, it is obvious that if the state wanted to set aside *non-riparian* land for ecological, environmental or recreational purposes it would have to do so by the exercise of the power of eminent domain. (See *San Diego Gas & Electric v. City of San Diego,* U.S. , 101 S.Ct. 1289 (1981) concurring and dissenting opinions) In this case, it has accomplished the same result as to riparian and littoral lands by one stroke of the pen, without compensation. As in *Leo Sheep,* these public needs can be satisfied by the power of eminent domain with the payment of compensation, and to a certain degree the concerns of the Court below can be met by the proper exercise of the police power on a case by case basis. The policy of California is decided by the Legislature and if there is need for further protection the police power is sufficient to meet that objective.[17] Where it falls short, the burden should be a public responsibility and it should not be imposed on the individual property owner for the benefit of the public in general.

### 3. BASED UPON AN EXPANDED CONCEPT OF "NAVIGABLE", UNDER STATE LAW, THE CALIFORNIA COURT APPLIED THE PUBLIC TRUST TO THE SHOREZONE OF LAKES AND RIVERS THAT IT NEVER HELD IN SOVEREIGN OWNERSHIP UNDER FEDERAL LAW

Whether or not the State of California received the title to the bed of any particular lake or river depends upon

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[17]California already has one of the most extensive regulations for environmental protection than any other State. (See Calif. Public Res. Code §§ 2100-21176). By the provisions of this law a development project will not be approved unless the adverse environmental effects have been mitigated or avoided. There are a plethora of additional state statutes for the protection of wildlife, fish and the wetlands, only a portion of which were mentioned by the Court below (See Lyon Appendix, A-46, n. 3).

whether the water was "navigable" when California became a state in 1850.[18] If the water was "navigable" *at that time* the state acquired the title to the bed under the lake or stream, but if it was not "navigable" at that time, the Federal Government retained the title and subsequent riparian and littoral property owners adjacent to the water received title to the center of the water.[19]

The test of "navigability," and therefore what titles the State received in 1850, must be determined by *federal law* and not by State law.[20] In 1850 water was "navigable" in law for determining title under the Federal test if it was "navigable in fact."[21]

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[18]*Montana v. United States,* U.S. , 101 S.Ct. 1245, 1251, 67 L.Ed.2d 493, 501 (1980); *Utah v. United States,* 403 U.S. 9, 9-10 (1971); *United States v. Utah,* 283 U.S. 64, 75 (1931); *United States v. Holt State Bank,* 270 U.S. 49 (1926); *Brewer-Elliott Oil Gas Co. v. United States,* 260 U.S. 77, 87; See *Kaiser Aetna v. United States,* 444 U.S. 164 (1979).

[19]*Utah v. United States,* 403 U.S. 9, 9-10 (1971); *United States v. Utah,* 283 U.S. 64, 75 (1931); *United States v. Holt State Bank,* 270 U.S. 49, 55 (1926); *Oklahoma v. Texas,* 258 U.S. 574, 583 (1922).

[20]*Utah v. United States,* 403 U.S. 9, 10 (1971); *United States v. Utah,* 283 U.S. 64, 75 (1931); *United States v. Holt State Bank,* 270 U.S. 49, 55-56 (1926); *Brewer-Elliot Oil & Gas Co. v. United States,* 260 U.S. 77, 87.

[21]"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be considered in the customary modes of trade and travel on water." *The Daniel Bell,* 77 U.S. (10 Wall.) 557, 563 (1871). See *The Propeller Genesee Chief v. Fitzpatrick,* 12 How 443, 457 (1852). Confirmed: *Utah v. United States,* 403 U.S. 9, 10 (1971); *United States v. Utah,* 283 U.S. 64, 75 (1931); *United States v. Holt State Bank,* 270 U.S. 49, 56 (1926); *Oklahoma v. Texas,* 258 U.S. 574, 586 (1922).

However, for purposes of its *navigational easement* California has adopted a much more expansive concept of "navigable." For these purposes any stream or pond is deemed "navigable" if it is *suitable for recreational purposes* even though it is not otherwise navigable under the "common law" test,[22] and even though the State does not own the underlying bed.

The opinions of the Court below make it clear that the Court has not limited its decisions to Clear Lake and Lake Tahoe; it has expended the "public trust" to *all* "navigable" waters of the State. (See Lyon Appendix, A-4 (majority) A-30, A-43 to A-47 (dissent)). In addition the Court has equated the test of "navigable" for determining the original title of the state (and in its view, the extent of the public trust) to the broader concept of "navigable" which governs the existence of *the navigational servitude* (rather than the more limited Federal test of "navigable" applicable for land titles). (Lyon Appendix, A-24 to A-25).[23]

While the navigational servitude over the surface of the water, under the State test, applies to all waters whether or not they are "navigable" for purposes of title, when a particular lake or river was not deemed "navigable" by the applicable federal test in 1850, the private riparian or littoral owner held the title to the bed under the water, and the State *never* had title to such lands. The application of the public trust, removing virtually all of the incidents

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[22]*Hitchings v. Del Rio Woods Recreation & Park Dist.*, 55 Cal. App.3d 560, 568; *People ex rel. Baker v. Mack*, 19 Cal.App.3d 1040 (1971).

[23]The reliance by the court on the *Mack*, *Hitchings* and *Bohn* decisions, all of which used the broad "recreational" definition of "navigable", in the context of the "public trust", and the expanded definition of the trust makes it apparent that the court equates the two concepts. (See Lyon Appendix, A-24 to A-25). In fact many of the waterways referred to by the Court below as "navigable" are not in fact "navigable" under the federal test.

of private ownership from the land, to lands to which the State has *never* had title, constitutes a "taking" of the private property ownership of the bed and shorezone and converts it to public property in violation of the Fifth and Fourteenth Amendments of the United States Constitution. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).[24]

## 4. THE CREATION OF THE "TIDELANDS TRUST" ON THE ARTIFICIALLY CREATED SHOREZONE CONSTITUTES A DEPRIVATION OF PROPERTY WITHOUT COMPENSATION

The decisions below held that the public trust exists not only as to the natural shorezone of inland non-tidal navigable waters, but also to the *artificial* shorezone *created* when the level of such waters has been raised to an artificially high level, by a dam or otherwise. (Lyon Appendix, A-50)[25] Although Amici challenge the decision of the Court below that the public trust is applicable to the shorezone of non-tidal navigable waters, even if that rule is accepted, the conclusion of the Court below that the trust also applies to an artificially created shorezone is not supported by either law or logic. Since the public trust can be imposed only on property that was once owned by the State and then conveyed by the State (Lyon Appendix, A-19), the decisions below result in an unconstitutional "taking

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[24]The Court below also indicated that the trust will apply to waters formerly non-navigable that have become navigable by the construction of "hundreds of dams." (Lyon Appendix, page A-49)

[25]The Court below concluded that the boundary of riparian and littoral property on non-tidal navigable waters is located at the artificially created low water mark, and then it emphasized that this "shorezone" can be used by the owner for purposes not inconsistent with the trust. The conjunction of these two concepts in companion paragraphs leads to the obvious conclusion that the Court below is referring to the *artificially created shorezone.*

of the artificially created shorezone area from the owner of the property.

The results of this decision can best be shown by a hypothetical example. Assume that the natural low water line is at "0", and the natural high water line is "10", and the level of the water is raised by a dam so that the artificial low water line is established at "10" and the artificial high water line is established at "20". If the public trust doctrine applies to the shorezone *acquired upon statehood*, the public trust would apply to the area between "0" and "10". However, the state has never owned any property above "10". Therefore, the California Supreme Court's imposition of the public trust on the artificial shorezone between "10" and "20" constitutes a taking of property to which *the State has never previously claimed any interest and which it has never held in sovereign ownership.*

The Court below justified its decision by the doctrine of prescription (Lyon Appendix, A-49 to A-50), but that conclusion is contrary to both the facts and the law.

Usually the State can only acquire a title or interest in property from a private owner by the power of eminent domain. The doctrine of a prescriptive acquisition of title by the state can pass constitutional examination only if there has been a continuous, hostile, and notorious possession of the property under a claim of title or *claim of right*; the conduct of the claimant must be such that the property owner was on notice of both the claim and the use and he slept in his rights for the period of limitations.[28] In this

[28]California Code of Civil Procedure sections 321-325. *Dimmick v. Dimmick*, 58 Cal.2d 417, 374 P.2d 824 (1962); *Laubisch v. Roberdo*, 43 Cal.2d 702, 277 P.2d 9 (1954); *West v. Evans*, 29 Cal.2d 414, 175 P.2d 219 (1946). See 3 Am.Jur.2d, Adverse Possession, § 6 at page 86, §§ 96-104 at pages 176-188; 3 Miller & Starr, *The Current Law of California Real Estate*, §§ 19:1-19:2 at pages 394-400, § 19:30 at page 440.

case, however, the State of California *has never made any claim of the public trust* on the artificial shorezone. (Lyon Appendix, A-27).

When the water level is raised the public may exercise its *navigational easement* over the surface of the water and it probably acquires an *easement* over the *water* at its artificial level. However, it cannot acquire the rights of the public trust on the artificial shorezone which it has never claimed when it has not given notice to the owner of the claim.[27] The taking of this artificial shorezone by the State for public trust uses, to which it has never had title, without prior notice to the property owner, constitutes a taking of private property without due process of law.

This obvious confiscation of private property is more extreme than that rejected by the court in *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). As in that case, navigable water was created by subsequent improvements without a prior government claim. If the Federal Government could not impose the navigational servitude on artificially created navigable water in *Kaiser Aetna,* the State Government should equally be prohibited from imposing the trust servitude on the privately created shorezone.[28]

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[27]In fact, to the contrary, not only has there been no claim by the State, all of the acts of the State have induced the property owners to believe that there were no limitations on the use of the shorezone.

[28]In *Kaiser Aetna* this court held that the imposition of the public right of access of the navigational servitude over former private property that became "navigable" as a result of subsequent improvements constituted a "taking" from the private property owner of *the right to exclude the public.* In this case the imposition of the public trust servitude on the artificial shorezone would deny the littoral and riparian owners *the right to exclude the public* from the newly created shorezone.

## 5. THE CUMULATIVE EFFECTS OF THE DECISIONS OF THE CALIFORNIA SUPREME COURT RESULT IN A BLATANT CONFISCATION OF PRIVATE PROPERTY

Amici concur with and support the analyses of the Petitioners regarding the application of the Fifth and Fourteenth Amendments of the United States Constitution to the decisions of the California Supreme Court. (Lyon Petition, pages 20-23; TSR Petition, pages 17-29). However, Amici wish to emphasize the conspicuous and severe confiscation of property that results from the *cumulative effect* of the decisions by the California Supreme Court.

In *1872* the California legislature established the boundary of waters that were *navigable at that time* at the low water mark. At no time prior to or after 1872 did the State make any claim to any purported rights under a public trust above the *natural low water mark*. To the contrary, every branch of state government confirmed the riparian and littoral owner's unfettered right to use and improve, and to exclude the public from, the shorezone. In reliance upon this encouragement, millions of dollars were invested to acquire waterfront property whose value depended largely on the private use of the shorezone, and they were induced to construct marinas, docks, homes and other improvements on or near the shorezone.

In frustration of these expectations, the California Court has *created* a public right in the shorezone where none has ever existed before. It has taken the common law test of navigability and equated it with the emerging doctrine of the navigational servitude and then, in effect, broadened the servitude to encompass the incidents of title in order to equate the newly created trust to the scope of the servitude. Through this convolution of logic the Court has taken

all of the essential characteristics of title to property that it has never before held in sovereign ownership.

Admitting that law must be flexible enough to mold itself to changing circumstances, such concepts must be limited to a prospective effect and should not be permitted to confiscate property or alter land titles. The judiciary should not be permitted to re-write history when to do so would deprive owners of their property rights. (See *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979).) Public policy cannot justify the imposition of an unreasonable burden on the individual for the benefit of the public in general.[29]

One hundred years of reliance on established legal principles have raised the rights of riparian and littoral property owners to the level of a *rule of property*. This Court has always recognized that an unforeseeable change in the law which materially alters an established rule of property is an unconstitutional taking of property without due process of law.[30] This Court has jealously guarded against the taking of property by a state court's retroactive change

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[29]The Court below justifies its conclusion on the public policy to protect the ecology and the environment. However, even if this policy should be acknowledged (See pages 10-11, supra), ". . . the determination whether a state law unlawfully infringes upon a landowner's property in violation of the Taking Clause requires an examination of whether the restriction on private property 'forc(es) some people alone to bear a public burden which, in all fairness and justice should be borne by the public as a whole.' " *Prune Yard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 2041 (1980).

[30]See, for example, *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 381 (1977); *Kean v. Calumet Canal & Improv. Co.*, 190 U.S. 452, 460 (1903); *Leo Sheep Co. v. U.S.*, 440 U.S. 668, 682-688 (1979); *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 331 (1973) (opinion for the Court by Justice Marshall); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486-487 (1924).

in the law.[31] This same prohibition applies when the state government attempts to disregard the consequences of an established period of acquiescence in private activities which it could have prevented at an earlier time.[32]

## CONCLUSION

The decisions of the California Supreme Court have not only clouded thousands of titles in California regarding millions of acres, but they also will undoubtedly encourage similar claims in many other states and will affect untold thousands of titles in these states as well.

During the last few years the California Supreme Court has gradually and perceptively eroded the essential rights of ownership of riparian and littoral property owners in California. It has expanded the concept of navigability and enlarged upon the application of the navigational servitude as a basis for imposing the onerous public trust on land it has never owned or claimed.

The cumulative impact of the conclusions reached by the California Supreme Court are astounding. Rather than recognizing the long history of accepted legal principles, and the impact of their decisions on those principles, the majority of the Court below embarked upon a tortiously

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[31]*Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 233, 235-241 (1897) ("[A] judgment of a state court . . . whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such a judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."; *Hughes v. State of Washington*, 389 U.S. 290, 297-298 (1967).

[32]See, for example, *United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 610-611, (3rd Cir. 1974) cert. den. 420 U.S. 927.

strained rewriting of history and the law. In the course of their journey they cast aside legal precedents that blocked their objectives, and where necessary, they created new law out of wholecloth to enable them to bridge otherwise irreconcilable differences in existing law and the results required by the application of that law.

In order to comprehend the full impact of these decisions, it is only necessary to recognize that prior to these decisions the riparian and littoral owners of land bordering California's non-tidal navigable lakes and rivers owned their lands in fee to the low water mark and the State had no interest above that mark. After these decisions these same land owners find themselves as only partial owners of their lands. The new co-owner is none other than the State of California. However, there is one key link missing in this sudden change of ownership—no compensation was paid to the private land owners for the interests acquired by the State. This fact results in the clear and unavoidable conclusion that the decision below cannot be allowed to stand in view of the Fifth and Fourteenth Amendments to the United States Constitution.

For the reasons stated, Amici join the Petitioners in requesting that writs of certiorari issue to review the decisions and judgments of the California Supreme Court.

Dated: August 14, 1981

Respectfully submitted,

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# Amicus Brief

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-163

RAYMOND R. LYON; MARGARET L. LYON; CHARLES F. FOGERTY; STELLA FOGERTY; RUSSELL S. GROVE; NANCY J. GROVE; HAROLD E. EBRIGHT, JR.; KATHERINE FAIRLIE EBRIGHT; GEORGE HILTON EDMONDSON; JANET LOUISE EDMONDSON; LAWRENCE L. LINDSEY, JR.; ROSEMARY F. LINDSEY; HOMER M. HAYWARD; REID W. DENNIS; and TAHOE MEADOWS, a California corporation,

*Petitioners,*

v.

STATE OF CALIFORNIA, STATE LANDS COMMISSION OF THE STATE OF CALIFORNIA; and DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA

*Respondents.*

and related case

No. 81-182

TAHOE SHOREZONE REPRESENTATION,

*Petitioner,*

v.

STATE OF CALIFORNIA *et al.*

*Respondents.*

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of California

## BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

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August, 1981

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES CITED | ii |
| INTEREST OF AMICUS CURIAE | 1 |
| SUMMARY OF ARGUMENT | 2 |
| OPINIONS BELOW | 4 |
| STATEMENT OF THE CASE | 4 |
| ARGUMENT: THE DECISIONS OF THE CALIFORNIA SUPREME COURT ARE VIOLATIVE OF THE PRINCIPLES OF DUE PROCESS | 5 |
| A. The California Court Erred in Disposing of the Estoppel Defense on Broad Policy Grounds | 5 |
| B. Rejection of the Estoppel Defense Deprives Petitioners and the Public of a Meaningful Hearing in Violation of Due Process Guarantees | 9 |
| CONCLUSION | 12 |

## TABLE OF AUTHORITIES CITED


| | Page |
|---|---|
| CASES: | |
| *Boddie v. Connecticut*, 401 U.S. 371 (1971) | 9 |
| *City of Long Beach v. Mansell*, 3 Cal. 3d 462 (1970) | 4,6,10 |
| *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) | 7 |
| *Fletcher v. Peck*, 7 U.S. (6 Cranch) 87 (1810) | 8 |
| *Fuentes v. Shevin*, 407 U.S. 67 (1972) | 10,11 |
| *Goldberg v. Kelly*, 397 U.S. 254 (1970) | 10 |
| *Hughes v. Washington*, 389 U.S. 292 (1976) | 10 |
| *Hurtado v. People of California*, 110 U.S. 517 (1883) | 8 |
| *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) | 9 |
| *Marks v. Whitney*, 6 Cal. 3d 251 (1971) | 9 |
| *San Diego Gas & Electric Co. v. City of San Diego*, 101 S. Ct. 1287 (1981) | 11 |
| *Stanley v. Illinois*, 405 U.S. 645 (1972) | 11 |
| *State of Minnesota v. Clover Leaf Creamery Company, et al.*, 100 S. Ct. 715, 726-27(1981) | 7 |
| *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815) | 8 |
| *The State of California v. The Superior Court of Placer County (Fogerty)*, 29 Cal. 3d 240 (1981) | *passim* |
| *The State of California v. The Superior Court of Lake County (Lyon)*, 29 Cal. 3d 210 (1981) | 4,9 |
| *Twining v. New Jersey*, 211 U.S. 78 (1908) | 8 |
| *United States v. General Motors Corporation*, 323 U.S. 373 (1974) | 9 |
| *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975) | 4 |
| *United States Fidelity and Guaranty Co. v. State Board of Equalization*, 47 Cal. 2d 384 (1956) | 4 |
| *Watson v. City of Memphis*, 373 U.S. 526 (1963) | 11 |
| MISCELLANEOUS | |
| Tribe, L., American Constitutional Law (1978) | 8 |

Nos. 81-163 and 81-182

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*Respondents.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of California**

**BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI**

## INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Raymond R. Lyon, *et al.*, and Tahoe Shorezone Representation (petitioners). Consent to the

filing of this brief has been granted by counsel for all parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of the State of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent 18-member Board (Board) of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated action and authorizes such legal action only where the Foundation's position has broad support within the general community. Amicus seeks here to support the Petitions for Writ of Certiorari and to augment the argument in support thereof. PLF's Board has authorized the filing of this brief.

PLF, its members, supporters, and contributors are concerned that the decisions of the California Supreme Court (Court) in these cases pose a serious threat to the integrity of the individual right of property by violating federal due process guarantees and fundamental notions of fairness and equity. Amicus hereby seeks to assert the interests of those of its members, contributors, and supporters whose rights in property have been extinguished without due process of law and just compensation.

## SUMMARY OF ARGUMENT

The petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California, entered in these cases on March 20, 1981. The decisions concern the ownership of lands lying between the high water and low water marks adjacent to nontidal navigable waters. The Court held that the state, on its admission to the union, succeeded to the ownership of such lands to the high water mark, but that riparian owners had been granted title to the low water mark by virtue of

California Civil Code §830 enacted in 1872. That enactment was construed as a grant of property to the upland landowners. It provides that the owner of the upland, when it borders on a navigable lake or stream where there is no tide, takes to the edge of the lake or stream at low water mark.

The portion of the Court's holding which is of particular concern to PLF is that which relates to the public trust easement. The Court held that the shorezone between the low water and high water marks is subject to the public trust. This trust easement is far-reaching. It creates a public right to use certain lands for commerce, navigation, and fishing as well as recreation and even preservation of the land in its natural state. Until the decisions of the California court, the public trust was only applicable to tidelands. The sudden and unforeseeable extension of the public trust easement to lands not previously subject to it has cast a cloud upon titles to thousands of parcels of property.

In light of the broad applicability of the public trust easement and the deprivation of individual property rights which results from the extension of the trust, amicus is especially concerned with the Court's summary disposition of the estoppel issue raised by petitioners. For over a century, the state's interests and those of the property owners in lands adjacent to nontidal waters had been settled. The petitioners raised the defense of estoppel to the state's assertion that the shorezones of navigable lakes and streams are subject to the public trust easement. The Court summarily disposed of the defense, reasoning that "[e]stoppel will not be applied to the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public." *The State of California v. The Superior Court of Placer County (Fogerty)*, 29 Cal. 3d 240, 244 (1981).

This disposition of the estoppel defense violates the federal due process rights of petitioners and other members of the public. The Court acknowledged that it was

establishing a principle "which will apply to 4,000 linear miles along all the navigable lakes and rivers in California." *Fogerty*, 29 Cal. 3d at 247. Yet, those members of the public who own lands within those 4,000 linear miles, but who were not before the Court, were denied a hearing prior to the extinction of their rights in property. Amicus asserts that the defense of estoppel essentially requires a factual inquiry[1] wherein a determination is made as to whether justice and right require application of estoppel against the government. *United States v. Wharton*, 514 F.2d 406 (9th Cir. 1975); and *United States Fidelity and Guaranty Co. v. State Board of Equalization*, 47 Cal. 2d 384, 388-89 (1956). The policy concerns of the Court, that application of the doctrine of estoppel on a case-by-case basis "would require a massive expenditure of time and money" (*Fogerty*, 29 Cal. 3d at 244), cannot justify infringement of constitutional guarantees.

## OPINIONS BELOW

The opinion of the California Supreme Court entered in *The State of California v. The Superior Court of Lake County (Lyon)* is reported at 29 Cal. 3d 210 (1981). The opinion of the California Supreme Court entered in *Fogerty* is reported at 29 Cal. 3d 240. Copies of the opinions are included in the Appendices to the Petitions for Writs of Certiorari.

## STATEMENT OF THE CASE

Amicus curiae adopts the statements of the case as they appear in the Petitions for Writ of Certiorari.

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[1] In *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 487-88 (1970), the Court set forth the requirements of equitable estoppel. The four principal elements require a factual inquiry. *See* Footnote No. 2, *infra*.

## ARGUMENT

## THE DECISIONS OF THE CALIFORNIA SUPREME COURT ARE VIOLATIVE OF THE PRINCIPLES OF DUE PROCESS

### A. The Court Erred in Disposing of the Estoppel Defense on Broad Policy Grounds

At the outset of this controversy, petitioners responded to the State of California's abrupt assertion of a public trust easement on their nontidal riparian property by raising the defense of estoppel. For over one hundred years prior to this assertion, the state had never claimed an interest in that land *above* the low water mark. Indeed, all three branches of the state government—the legislature, the executive branch and the state courts—expressly recognized clear and complete private ownership of lands above the low water mark. Contrary to established law and policy, the state now asserts a public trust easement on *all* riparian lands up to the *high* water mark. However, petitioners purchased, improved, and paid taxes upon the land in question in reliance on the state's previous position. The state's conduct and petitioners' reliance thereupon are the basis for estoppel.

The Court rejected the estoppel argument by stating:

> "The major issue raised by the plaintiffs, not discussed in *Lyon*, is that of estoppel. Strictly speaking, that issue is not formally before us. Plaintiffs' complaint pleads a cause of action for declaratory relief in estoppel, but their motion for partial summary judgment did not seek a ruling on this issue, and the trial court did not pass upon the question. The People, urging that plaintiffs should not be permitted to raise the issue, assert that estoppel is a question of fact for the trial court in any future proceeding. This argument is technically tenable. But if estoppel were to be determined on a case-by-case basis it would require a massive expenditure of time and

> money by the state, riparian landowners, and the judiciary. Such an effort may be avoided if, as we shall conclude, we can decide the question as a matter of law on the basis of the present record. (Cf. *City of Long Beach* v. *Mansell* (1970) 3 Cal.3d 462, 487-488 [91 Cal.Rptr. 23, 476 P.2d 423].)" *Fogerty*, 29 Cal. 3d at 244.

The Court, cognizant of the requirements of equitable estoppel discussed in its opinion in *City of Long Beach v. Mansell*, 3 Cal. 3d at 487-88,[2] concluded that

> "[s]ince we find that one critical requirement for the application of the doctrine is absent, we need not discuss other aspects of the doctrine or their relevance to the present case. *Estoppel will not be applied to the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public* (*Mansell*, 3 Cal.3d at p. 493), and we entertain no doubt that this would be the result if we were to hold that the People are barred from asserting the public trust in the lands at issue." *Fogerty*, 29 Cal. 3d at 244 (emphasis added).

The estoppel issue could not be resolved solely on the basis of public policy impact. Nevertheless, because of its desire to establish "a principle which will apply to 4,000 linear miles along all the navigable lakes and rivers in California," *Fogerty*, 29 Cal. 3d at 247, the Court decided the issue on public policy grounds alone and denied the property owners an opportunity for meaningful hearings

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[2] The four elements of estoppel were set forth in *City of Long Beach v. Mansell*, as follows:

> "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." 3 Cal. 3d at 489. *Also cited* in *Fogerty*, 29 Cal. 3d at 244 n.2.

relative to the estoppel defense. The Court apparently ignored the fact that a vast amount of the affected land is in private ownership. Furthermore, by impressing these privately owned lands with the public trust, the court established a principle based on conclusions which could not be reached without factual inquiry. The court stated:

> "The exercise of the police power has proved insufficient to protect the shorezone. The urgent need to prevent deterioration and disappearance of this fragile resource provides ample justification for our conclusion that the People may not be estopped from asserting the rights of the public in those lands." *Id.*

In one fell swoop, the Court concluded that the myriad of California environmental statutes and controls enacted on the local level are insufficient to protect the shorezone.[3] It is impossible to reach such conclusion without a factual inquiry. The disposition of the estoppel defense thus was in error. At a very minimum, the Court should have remanded the matter to the trial court for factual inquiry. By disposing of the argument summarily, the Court effectively extinguished rights in property and clouded thousands of titles within the state without adhering to the principles of due process guaranteed by the Fifth and Fourteenth Amendments.

When private individuals raise the defense of equitable estoppel against the government, the basic fairness of the public/private relationship is called into question.

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[3] Indeed, amicus asserts that it is improper for the state court to make such pronouncements regarding California's environmental statutes and ordinances in the abstract. Such determination requires an evaluation of legislative facts. This Court has stated that "it is up to legislatures, not courts, to decide on the wisdom and utility of legislation," *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963), and has emphasized that "it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *State of Minnesota v. Clover Leaf Creamery Company, et al.*, 100 S. Ct. 715, 726-27 (1981).

From the earliest days of the republic, this Court has relied "upon the principles of natural justice, upon the fundamental laws of every free government [and] upon the spirit and the letter of the Constitution of the United States" to forbid state action of the kind from which the instant controversy arises. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815).

In *Fletcher v. Peck*, 7 U.S. (6 Cranch) 87 (1810), the State of Georgia patented land to plaintiffs' predecessor in interest pursuant to an act of the state legislature. The legislature subsequently attempted to pass an act declaring the earlier measure null and void and reasserting the right of the state to all land patented thereunder. This Court held that the state was estopped to pass the latter enactment "either by general principles, which are common to our free institutions, or by the particular provisions of the Constitution of the United States." *Id.* at 139.

These fundamental principles of liberty and justice find expression in the concept of due process of law. *Twining v. New Jersey*, 211 U.S. 78, 106 (1908). In instances of attempted deprivation of property rights, the constitutional guarantee of due process protects private citizens from the arbitrary exercise of governmental power. *Hurtado v. People of California*, 110 U.S. 517, 536 (1884).

As in *Fletcher*, the action of the State of California infringes upon fundamental principles of fairness. Through the Due Process Clause, these principles demand that the state be estopped to assert any interest in riparian lands above the low water mark. In reliance on the expressions of all branches of California government, petitioners have developed settled expectations with respect to their property rights in the shorezone. These rights have "vested" and should be secure against governmental disruption. *See* Tribe, L., *American Constitutional Law* at 456 (1978).

**B. Rejection of the Estoppel Defense Deprives Petitioners and the Public of a Meaningful Hearing in Violation of Due Process Guarantees**

The decision of the Court abridges the due process rights of the thousands of riparian farmers and homeowners in California who are not parties to this action. By judicial fiat, they have been deprived of valuable property interests without the constitutionally mandated procedural protections.

This Court in *United States of America v. General Motors Corporation*, 323 U.S. 373, 378 (1945), defined private property as "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." Included as a "fundamental element of the property right" is the right to exclusive use. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). By holding that members of the public have the right to use the dry land area between the high and low water marks for a wide variety of purposes, the California Supreme Court has attempted to vitiate the right of exclusive use.

The Court seeks to impose this broad public trust easement where none has previously existed. One only needs to observe how the public trust easement is applied in California to realize that the value of petitioners' vested rights in the property would be reduced to the vanishing point.[4] The state desires to impose the public trust easement (heretofore applied in California only to lands subject to tidal influence) because it facilitates use of property without paying for it. But it is well settled that before a property owner is deprived of fundamental property rights, he is entitled to a hearing which comports with established principles of due process. *Boddie v. State of Connecticut*, 401 U.S. 371 (1971). This "prohibition

[4] Among the public trust purposes recognized by the Court is preservation of land subject to the trust in its natural state. *Lyon*, 29 Cal. 3d at 210; *Marks v. Whitney*, 6 Cal. 3d 251, 259-60 (1971).

against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

It is of little merit to contend that a public trust easement was reserved in the original grant of title to petitioners and, therefore, that petitioners have not been harmed. This reasoning is mere artifice. As this Court has declared:

> "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967).

This Court, on numerous occasions, has stated that due process of law requires that the person who is to be deprived of property is entitled to a meaningful opportunity to be heard before the fact. *Fuentes*, 407 U.S. at 80; *Goldberg v. Kelly*, 397 U.S. 254, 255 (1970). Because the imposition of a public trust easement constitutes a deprivation of property under the Fourteenth Amendment, each riparian landowner must be afforded a full, fair, and meaningful opportunity to be heard. A principal issue in such hearings would be whether each affected landowner can assert the doctrine of estoppel against the state. This issue cannot be disposed of "en masse" for all riparian landowners along the 4,000 linear miles of lakes and rivers in California because the application of equitable estoppel requires factual determinations that are bound to be different for each case. Among the factual issues that will vary from case to case is whether imposition of the public trust carries a policy sufficiently strong to outweigh the "great injustice" which a riparian owner may suffer if the state is not estopped. *Mansell*, 3 Cal. 3d at 496-97. *See Fogerty*, 29 Cal. 3d at 251, Clark, J. dissenting.

The Court takes the policy position that individual hearings on the estoppel issue would be "expensive" and "time-consuming" *Fogerty*, 29 Cal. 3d at 244. Justice Clark in his dissent noted:

> "There, are no doubt, thousands of homeowners in cities of the Sacramento and San Joaquin Valleys, as well as other areas of the shorezone . . . [who] will suffer thousands of 'great injustices,' clearly outweighing the public trust loss in respect to individual lands. [3 Cal.3d at p. 501.]
>
> "While it would be a tremendous burden on the judicial system to determine in individual cases whether imposition of the trust involves 'great injustice' outweighing trust detriment, the courts' business is the administration of justice. However burdensome the alleviation of 'great injustice' may be, courts should not shirk their duty." *Fogerty*, 29 Cal. 3d at 251, Clark, J. dissenting.

The "vindication of conceded constitutional rights cannot be made dependent upon a theory that it is less expensive to deny than to afford them." *Watson v. City of Memphis*, 373 U.S. 526, 537-38 (1963). *San Diego Gas & Electric Co. v. City of San Diego*, ____ U.S. ____, 101 S. Ct. 1287, 1308 (1981), Brennan, J. dissenting. The Constitution recognizes higher values than speed and efficiency. *Fuentes*, 407 U.S. at 91; and *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). To deny each of the landowners an individual hearing on the pretext that it would be too much trouble is to subordinate our highest constitutional values for the purpose of convenience.

## CONCLUSION

For the reason stated above, this Court should review the decisions of the Court which, through imposition of the public trust easement on nontidal shorelands, deprive riparian owners of their property without due process of law.

Respectfully submitted,

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